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No. _____

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ALEXANDER L. STEVAS

In The

Supreme Court of the United States

October Term, 1984

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CHIC MAGAZINE, INC.,

Petitioner-Defendant,

vs.

ED BRAUN AND JEANIE BRAUN,

Respondents-Plaintiffs.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether the constitutional right to publish accurate information concerning a newsworthy event can be abridged because of the nature and unrelated contents of the publication in which the information appears?

2. Whether a publisher can be held liable for defamation or for false light invasion of privacy for the republication of an accurate, non-distorted, unaltered, and previously widely disseminated postcard in a men's sophisticate magazine solely by reason of the postcard's inclusion in the magazine in the absence of proof that the content of the postcard or the context in which it was placed would warn a reasonably prudent publisher of its potentional for defamation or false light invasion of privacy.

3. Whether a publisher can be held liable for false light invasion of privacy arising from reports of matters of public interest in the absence of proof that the publisher published the report with knowledge of its falsity or serious doubts about its truth.

4. Whether the Plaintiff was a public person to the extent of her voluntary, paid participation in an admittedly newsworthy entertainment event, so that the standards of *New York Times v. Sullivan* applied to her claim of libel and "false light" invasion of privacy?

5. If the Plaintiff was not a "public person," whether the publisher could be liable as a matter of law under any fault standard for publishing false statements when it republished an accurate non-distorted, unaltered, and previously widely disseminated postcard solely by reason of the nature and unrelated contents of the remainder of the publication.

6. Whether a jury was properly allowed to consider the nature and unrelated contents of a publication in determining the issue of falsity?

7. Whether a Plaintiff has the burden to prove falsity in a libel or "false light" invasion of privacy action, and whether that burden was satisfied in this action?

8. Whether the jury instructions given and the findings made would support an award of punitive damages under applicable First Amendment principles.

9. Whether a recovery for invasion of privacy may be sustained on the basis of a jury answer to a single interrogatory inquiring about the separate torts of "false light" invasion, and invasion by "appropriation" where the evidence does not support the finding of both torts, and there is no basis to ascertain which tort was the basis for the jury finding?

10. Whether recovery for libel or "false light" invasion of privacy is barred by consent?

PARTIES TO THE PROCEEDING BELOW

The Defendant-Appellant below is Chic Magazine, Inc. Larry Flynt was originally a Defendant, but was dismissed, and is not before the Court. *Chic* Magazine, Inc. has now been merged into Larry Flynt Publications, Inc.

The Plaintiffs-Appellees are Ed Braun and Jeannie Braun.

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The Petitioner *Chic* Magazine, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

REFERENCE TO OPINIONS

The judgment of the United States District Court for the Western District of Texas, Austin Division, dated April 21, 1982, was not reported and is reproduced as Appendix A.

The original opinion of the United States Court of Appeals for the Fifth Circuit is reported at 726 F.2d 245 and is reproduced as Appendix B, and its Judgment is Appendix C.

The opinion of the United States Court of Appeals for the Fifth Circuit on rehearing is reproduced as Appendix D.

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JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1984. Rehearing was denied on May 14, 1984, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

———o———

STATEMENT OF THE CASE

(i.) *Course of proceedings and disposition in the Court below.*

On Dec. 19, 1977, Ed Braun, and his wife, Jeanie Braun, filed suit in the United States District Court (W.D. Tex., Austin Div.), against Larry C. Flynt and *Chic* Magazine, Inc., alleging invasion of privacy, slander, and libel as a result of a photograph of Mrs. Braun published in the December, 1977, issue of *Chic* Magazine. R. II-329-332. Jurisdiction was based on diversity of citizenship under 28 U.S.C.A., Sec. 1332.

Defendants Flynt and *Chic* Magazine, Inc. *("Chic")*, answered, R. II-323-324, and filed a third party complaint against Aquarena, Inc. ("Aquarena"), the employer of Mrs. Braun, which gave consent to publication of the photograph. R. II-317-318. Aquarena responded with an original answer and counterclaim for damages against Flynt and *Chic*. R. II-307-309.

The case was tried twice. At the conclusion of the evidence in the first trial, the Court granted Flynt's motion for directed verdict and dismissed him. R. I, docket sheets, p. 3A, docket entry 2/12/82; R. I-85. The jury then deadlocked, and the Court declared a mistrial. R. I, docket sheets, p. 4, docket entry 2/12/82. Prior to the

second trial, *Chic* and Aquarena mutually released their claims, and Aquarena was dismissed.

The second trial commenced April 19, 1982, R. I. docket sheets, p. 4, docket entry 4/19/82. On April 20, 1982, the jury returned a verdict which found *Chic* guilty of both libel and invasion of privacy, and awarded Plaintiff Jeanie Braun actual and exemplary damages totaling $95,000.00. R. I-19-23. Ed Braun sought no damages and none were awarded. The Court entered judgment on the verdict on April 21, 1982. R. I-17-18. *Chic* appealed, R. I-1, and the Fifth Circuit Court of Appeals vacated and remanded for retrial of the damages issues, but allowed Mrs. Braun to waive her right to retrial and obtain judgment for actual and punitive damages for invasion of privacy. 726 F.2d 258.

(ii.) *Statement of facts*

In May, 1977, Mr. Hank Nuwer, a writer and associate editor for *Chic* Magazine, Inc., traveled to Austin-Texas, to observe a performance of a band named "Balcones Fault" at the "Armadillo World Headquarters". He was unable to obtain a hotel room in Austin, and was taken by Howard Bloom, of the Howard Bloom Agency in New York, to San Marcos, Texas, where the two of them stayed at the Aquarena Hotel. R. 110-111.[1]

Mr. Nuwer spent the following day at Aquarena, an amusement and entertainment "park theme" attraction. See P.Ex. 1. While there, Mr. Nuwer became acquainted with the entertainment offered at Aquarena. R. 111, 231.

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[1] References to the record which do not include a Volume number are to Volume III, the transcript of testimony at the second trial.

An act which struck his fancy in particular was "Ralph the Diving Pig." In his words:

> "Then I saw these postcards which struck my sense of humor. I thought they were hysterical. I liked them a lot. The whole idea of a swimming swine and the idea of a swine dive just struck me as a very funny thing." R. 231.

He bought the postcards, and obtained Aquarena "hand out" brochures. R. 232, 238. When he returned to his office in Los Angeles, he convinced his editor "that this should go in" the *Chic* magazine. R. 232. Two days later, he called Jennifer Ross,[2] the public relations director of Aquarena. R. 233. Mr. Nuwer told Ms. Ross that he had personally been to Aquarena and seen the attractions, and would like to include a picture of "it" [Aquarena] in his magazine. R. 33. He asked for and Ms. Ross sent him "transparencies" or "negatives" depicting Ralph, the Swimming Pig. R. 34-35, P.Ex.2. With the transparencies, Ms. Ross sent a cover letter (P.Ex.2) stating:

> "Please find enclosed the negative [sic][3] you requested on Ralph, our swimming pig. I have also included new release on Ralph which will give you further information about him. We are looking forward to his picture appearing in your publication. Do not hesitate to contact me if I can be of any more assistance to you." R. 35.

One of the transparencies sent to Mr. Nuwer by Ms. Ross depicted Ralph the Pig diving into the water. The other picture depicted Ralph diving into the water with Mrs. Braun in the water. R. 35. The latter picture, which was republished, unaltered, in the December, 1977, issue

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[2] Ms. Ross subsequently married, and became Mrs. Benton.

[3] Ms. Ross sent more than one negative.

of *Chic,* had been widely disseminated in the form of postcards, brochures and other Aquarena publications.

The only fact dispute during trial concerned the first telephone conversation between Mr. Nuwer and Ms. Ross. Mr. Nuwer testified that he told Ms. Ross that he was from *Chic* Magazine, R. 237, and that *Chic* was a men's magazine, R. 233, 234, 235, 237. He did not recall Ms. Ross asking "what type of magazine is *Chic,*" R. 237, 238, but, in addition to telling her that it was a men's magazine, he told her it contained men's fashion, travel, and humor. R. 233-234. According to Mr. Nuwer "the idea of nudity never came up." R. 234

Ms. Ross described the conversation differently. She said she asked Mr. Nuwer a "little bit" about the magazine, and that Mr. Nuwer said it was a fashion magazine that had travel articles in it. R. 33. She claimed that Mr. Nuwer never used the word "men's." R. 33. She also said she asked Mr. Nuwer what type of readership the magazine had, and "he said the same clientele that would read a Redbook or McCalls." R. 33.

After this initial conversation, Ms. Ross told her boss, Mr. Phillips, the Aquarena President and General Manager, about the conversation, and identified the magazine to him. Mr. Phillips authorized her to send the requested transparencies to Mr. Nuwer. R. 49, 151-2.

Ms. Ross admitted that Mr. Nuwer was primarily interested in the pig. R. 52. Mr. Nuwer said that he would have been "perfectly happy" to have just published the picture of the pig diving into the water, if he had known of any objection to publication of the picture which included Mrs. Braun, because: "That's the funny part, not the girl in the water." R. 235-236.

Aquarena has had the "Ralph the Diving Pig" act twenty-two years, R. 161, but Ralph became "famous" fourteen years ago as a result of an appearance with Charles Karault, the well known television commentator. R. 152. Since that time, Aquarena has received "hundreds and hundreds" of requests concerning him. Ralph has been featured in articles in the United States, Canada, Mexico and England, and almost all the television stations in the "main towns" of Texas have exhibited film of him. R. 152.

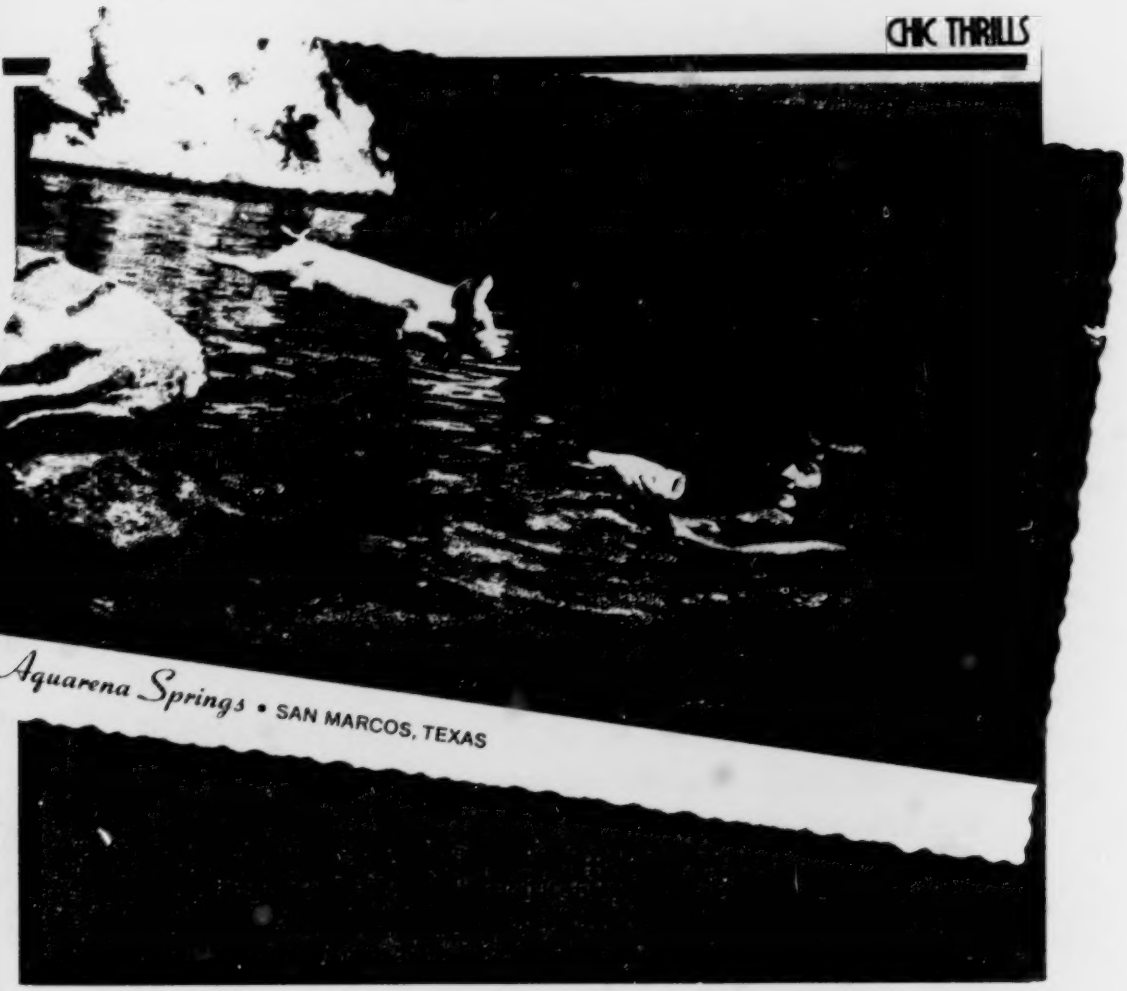
Without question, the act was "newsworthy" and, as said by Ms. Ross, "renowned." R. 53. This point was not disputed. The Court charged the jury to this effect, without objection. R. 298.

Mrs. Braun, the lady depicted with Ralph in the picture that was published, performed at Aquarena for five years, both as an aquamaid, and as a trainer in the "Ralph the Diving Pig" act. R. 213. Aquarena attractions are attended by an average of 2,000 to 3,000 people a day during the summer season, R. 56, which runs from the end of May through August, or approximately four months. R. 57. Aquarena is open every day of the year, but in the winter the attendance drops. R. 56-57

Mrs. Braun signed a photography release to Aquarena identical to the one represented by P.Ex. 4, which provides:

> "I [Jeannie Braun] in consideration of the fact that I am employed and paid by Aquarena, Incorporated, agree as part of my employment that all photos taken of me can be used by Aquarena Springs and their advertising and publicity agents. It is understood that all photographs are to be in good taste and without embarrassment to me and my family." R. 42, 58.

This is the picture and caption that appeared in the December, 1977, issue of *Chic*:



This picture, which is the sole basis of the lawsuit against *Chic,* is identical to the picture that appears on postcards and other publicity and promotional material relating to Aquarena, and Mrs. Braun approved it for such use. R. 209. It was admitted, even by Mrs. Braun, that there was nothing false, demeaning, changed, distorted, offensive, or

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"wrong" with either the picture or the caption, R. 53-55, 212.[4]

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the decisions of this Court and other Courts of Appeal concerning the constitutional restrictions upon the imposition of liability for libel and invasion of privacy by placing an individual in a false light.

A. The right to republish factually accurate, non-distorted, unaltered newsworthy material already disseminated to the public is constitutionally protected, and its exercise cannot be punished because of the nature and unrelated contents of the publication in which it appears.

The Fifth Circuit decision denies the constitutional privilege applicable to torts that involve publicity relating to public figures and newsworthy events. *Time, Inc. v. Hill,* 385 U.S. 374 (1967); *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971); *Gertz v. Welch,* 418 U.S. 323 (1974). The two types of publicity have been said to be protected by "two closely related but analytically distinct privileges." *Campbell v. Seabury Press,* 614 F.2d 395, 397 (5th Cir. 1980). The "newsworthy" privilege is not limited to the dissemination of news either in the sense of current events or

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[4] Because of this, the concurring opinion of Judge Politz concluded at 726 F.2d 259: ". . . factual accuracy and non-distortion [of the picture and caption] forecloses consideration of the issue of damages based on alleged defamation." The majority opinion concluded otherwise, holding libel could be inferred despite the factual accuracy, but declined to decide whether libel was established.

commentary upon public affairs. Rather, the privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with exigencies of their period. The protection offered by the privilege encompasses information relating to individuals who either have not sought or have attempted to avoid publicity. *Ibid.*

In *Virgil v. Time,* 527 F.2d 1122 (9th Cir. 1975), the Ninth Circuit held that:

> "A factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities. The constitutional privilege protects all truthful publications relevant to matters of public interest." *Neff,* at p. 861.

For example, in *Neff v. Time, Inc.,* 406 F.Supp. 858 (W.D. Pa. 1976), the plaintiff, a fan at a Pittsburg Steeler football game, was photographed with his fly open, and the photograph was published in *Time* magazine because Neff was a part of a newsworthy event, the publication of the photo was held to be privileged.

Chic undoubtedly is entitled to claim the "newsworthy" privilege. This is not a "prior restraint" case: the right to publish *Chic* is unchallenged. R. 260. The event depicted was admitted to be newsworthy by Plaintiffs' counsel, R. 260, and the trial court so instructed the jury. R. 298. The depiction of Mrs. Braun was in a republication of the picture disseminated through the country. It was factually accurate and not altered, distorted or offensive, a fact admitted by the Plaintiffs and recognized by the court below. R. 53-55, 212; 726 F.2d 259. The constitu-

tional right to republish accurately and without alteration newsworthy material insulates the publication against liability for either "libel" or "invasion of privacy."

Although the photograph which included Mrs. Braun, and its caption, were admitted to be unobjectionable, R. 53-55, 209, 212. Mrs. Braun based her claim of "libel" and "invasion of privacy" on the nature of the magazine, and its unrelated contents. R. 210-212. The trial court accepted this hitherto unrecognized theory and allowed the issue (Dec. 1977) of the magazine in which the picture appeared to be introduced in its entirety, R. 241-241, told the jury to look at *all* of it, R. 241-242, and allowed them to consider all its contents in determining if libel or invasion of privacy had been established. The Fifth Circuit agreed with the trial court's rulings (except to the extent that Judge Politz concluded that libel could not be based on publication of truthful information relating to the Plaintiff).

Both lower courts were persuaded to allow punishment of the Defendant because of the nature and unrelated contents of the Dec. 1977 issue of *Chic,* when the material relating to the Plaintiff could not possibly justify that punishment. This creates a dangerous precedent, with unlimited potential for abuse.

Every known case dealing with a claim that defamation or invasion of privacy can be imputed from the nature of and unrelated material in a publication has reached a contrary result. *Molony v. Boy Comics Publishers, Inc.,* 98 N.Y.S.2d 119 (N.Y. Supp. App. Div. 1950), says, at p. 124:

> "Neither does defendant's article become fiction due merely to the circumstance that the incident is described in a magazine containing other articles, presented through the same media, that are of a fictional nature. This is true of most magazines, which contain short or serial stories interspersed with other kinds of articles. As was said by Justice Shientag in the *Lahiri* case, 162 Misc. 776, 782, 295 N.Y.S. 389, 'it is the article itself rather than its location that is the determining factor.'"

Goelat v. Confidential, 171 N.Y.S.2d 223 (N.Y. Supp. App. Div. 1958) expressly declined to pass judgment on the public's reading taste, and held, in effect, that the nature of the magazine provided no basis for a finding of invasion of privacy. In *Handelman v. Hustler Magazine, Inc.*, 469 F.Supp. 1053 (S.D. N.Y. 1979), the Court said, p. 1060:

> "But magazines with sexually explicit text and phographs of genitalia are a part of our contemporary scene. Successful candidates for the presidency of the United States consent to interviews in magazines of the same genre as *Hustler*. *We think that Plaintiff is not entitled to damages merely because there is a oblique reference to him in a magazine which he believes to be in bad taste.*" (Emphasis supplied.)

Ann-Margret v. High Society Magazine, Inc., 498 F.Supp. 401 (S.D. N.Y. 1980) was a suit for libel and invasion of privacy which resulted because pictures of Ann-Margret partially nude, which had originally appeared in film footage in the movie "Magic", were reprinted in *High Society*, a magazine which specialized in revealing nudity of prominent women. The claims were rejected. The Court reasoned that when an individual consents to be publicly viewed in a certain manner it cannot be argued that a subsequent faithful reproduction of that appearance constitutes an actionable wrong notwithstanding her belief that

the reproduction in a magazine she disliked caused her embarassment: "[h]aving consented to the exhibition there is no invasion of privacy because [the pictures were] not shown to the audience contracted for." 498 F.Supp. 405.

A much publicized case on point is *Falwell v. Penthouse*, 7 Med.L.Rptr. 1891 (DC, W.D. Va. 1981). *Falwell*, whose electronic ministry is broadcast nationwide, in Canada, and the Caribbean, brought suit against *Penthouse* for publications of his photograph and interview. He alleged five causes of action which comprehended claims identical to those in this case. Underlying each cause of action was Falwell's objection to the nature of *Penthouse* magazine.

The court rejected Falwell's claims of defamation because there was no "inaccuracy in the manner in which Plaintiff was explicitly depicted," 7 Med.L.Rept. at 1895, and characterized the defamation claim as being based "solely on a foundation of innuendo," *id.*, which Falwell sought to draw from the nature and unrelated contents of the magazine. The Court answered these efforts by saying, *id.* at 1896:

> "The mere fact that plaintiff may not approve of publications such as *Penthouse*, or may not desire *Penthouse* to discuss his activities or publish his spoken words, does not give rise to an action cognizable under the law. The First Amendment freedoms of speech and press are too precious to be eroded or undermined by the likes and dislikes of persons who invite attention and publicity by their own voluntary actions."

Faucheux v. Magazine Management, 5 Med.L.Rept. 1697 (DC, E.D. La. 1979) is virtually identical to this case. Mr. and Mrs. Faucheux were a police officers' motorcycle team, who were photographed kissing while in uniform and astride police motorcycles. The photo was publicly

disseminated. Just as in the present case, consent was given to the making of the photograph, with knowledge that it was to be publicly disseminated. The photograph was published in *Men* Magazine without alteration and with a caption properly identifying the Plaintiffs as husband and wife. It appeared in a two page spread entitled "Photo Stoppers", which included, on the opposite page from Plaintiffs' photograph, a picture of two semi-nude women cavorting in a London pool. The issue in which it appeared also included numerous other photographs of scantily clad or nude females accompanied by articles of questionable good taste and moral value.

The Faucheuxs had not expressly consented to publication of the picture in *Men,* and brought suit claiming "false light publicity" and willful and intentional tort. They contended that the photograph had been seen in *Men* by acquaintances at the police department and thereafter they were the source of constant ridicule.

The court reviewed the "false light" contention, found the item to be "newsworthy" and that as police officers the plaintiffs were "public figures." The court held that since there was no indication of malice—the photograph being published without alteration and with a proper caption—the First Amendment provided the defendants a privilege to publish it.

With respect to plaintiffs' efforts to inject consideration of the nature and other contents of the magazine, the court said:

> "Nor is the mere fact that plaintiffs' photograph was published in a periodical of questionable 'good taste' sufficient grounds to support this action. *Publication of an item among lurid or indecent articles or photographs will not destroy the constitutionality protected*

privilege otherwise applicable to a newspaper item. See *Molony v. Boy Comics Publishers, Inc.*, 277 App. Div. 166, 89 N.Y. S.2d 119 (1st Dep't 1950); *Bradley v. Almat Publishing Corp.*, 32 Misc.2d 989, 225 N.Y. S.2d 226 (Sup.Ct. N.Y. 1962). The photograph itself is accurate and does not indecently portray or depict plaintiffs nor does the caption associated with the picture mislead or falsify any information pertaining to the plaintiffs. Although the nature and quality of *Men* magazine may be of questionable moral character, *it is not within this court's duty to comment upon the 'good taste' of this publication. A factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities. Neff v. Time, Inc., supra; Virgil v. Time, Inc., supra.*" (Emphasis supplied.)

Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) cautions against legal doctrine which "invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." No false fact relating to Mrs. Braun was published. *Chic* merely republished a photograph already widely disseminated to the public. Since the material concerning her was not in fact false, it cannot be made so by innuendo based on unfair or forced construction or interpretation. *Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677 (1962); *Sarkees v. Warner-West Corp.*, 349 Pa. 365, 37 A.2d 544 (1944); *Fogel v. Forbes*, 6 Med.L.Rept. 1941 (E.D. Tenn. 1980). By allowing the nature and unrelated contents of *Chic* to serve as a basis for imputation of falsity, the lower courts approved the punishment of a magazine which was unpopular with the jury.[5]

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[5] The punishment motivation is evident in the Fifth Circuit opinion. Accepting Ms. Ross's testimony that Mr. Nuwer told her that *Chic* was a "fashion magazine" with travel articles and

(Continued on next page)

Although the Fifth Circuit described in considerable detail other articles on the same page as Mrs. Braun's picture, material appearing on the facing page, and the cover of the issue, 726 F.2d at 248, no ordinary person reasonably could have associated them with Mrs. Braun. Nevertheless, the Fifth Circuit concluded that "Mrs. Braun's picture was placed without her consent in a magazine devoted exclusively to sexual exploitation and to disparagement of women" 726 F.2d at 254, and approved the implicit jury finding "that the ordinary reader automatically will form an unfavorable opinion about the character of a woman whose picture appears in *Chic* Magazine." *Ibid.* This mischaracterization and insupportable conclusion reflect a prejudice to which constitutional guarantees were sacrificed.

B. A publisher cannot be held liable for defamation or false light invasion of privacy arising from the accurate, non-distorted, unaltered republication of a widely disseminated postcard solely by reason of its inclusion in a men's sophisticate magazine in the absence of proof that the publication would warn a reasonably prudent publisher of its potential for defamation of false light invasion of privacy.

(Continued from previous page)

"the same clientele that would read a *Redbook* or *McCalls*," the Court snidely noted: "The same clientele indeed; in the sense that both sets of readers were featherless bipeds." 276 F.2d 247-8, n. 1. The same animus is present in the accusation at 726 F.2d 257, that the nature of the magazine was misrepresented "on at least two separate occasions" and "by two different *Chic* employees." This was cited as proof that any misrepresentations were not inadvertent or immaterial, and that the editorial staff of *Chic* was guilty of conscious deceit for the purpose of obtaining the picture (which was available to anyone for the price of a postcard). Yet, the record is undisputed that there was only one conversation between Nuwer and Ross, in which there was any mention of the nature of the magazine, and (by the accounts of both participants) the discussion of this point was brief and perfunctory. R. 33, 50-51, 233-37.

The First Amendment forbids holding a publisher liable for a factual misstatement whose content did not warn a reasonably prudent publisher of its defamatory potential or its potential to place a person in a false light. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Here, where the published photograph was unaltered and its caption did not mislead or falsify any information pertaining to Mrs. Braun, the fact that the properly captioned and reproduced photograph appeared among other items in the magazine that Mrs. Braun might find objectionable but to which she was not directly or indirectly tied would not warn a reasonably prudent editor that the publication had defamatory potential or the potential to place her in a false light. This is particularly true since the unrelated contents of the magazine were not of and concerning Mrs. Braun.[6] The trial court and Fifth Circuit's decision have thus imposed liability upon Petitioner without fault, which is forbidden by this Court's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

C. A publisher cannot be liable for false light invasion of privacy for false reports of matters of public interest in the absence of proof that it published the report with knowledge of its falsity or with serious doubts about its truth.

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[6] The Fifth Circuit relied on the well-recognized rule that to determine the effect of the alleged defamation on the mind of the "ordinary reader," an allegedly defamatory story or article must be construed as a whole to determine whether the statement, in the context of the overall effect of the story or article about the plaintiff, was defamatory. *See* Golden Bear Distribution System v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983). But such an approach is unjustified where the unrelated contents of a magazine are not "of and concerning" the plaintiff.

In *Time, Inc. v. Hill,* 385 U.S. 374 (1967), this Court held that plaintiffs could not recover for invasion of privacy by placing them in a false light in connection with the publication of matters of public interest absent a showing of knowing falsity or serious doubts about the truth. It was undisputed below that the event depicted in *Chic* was newsworthy. The Fifth Circuit also stated that if it were required to apply the "rigorous first amendment standard applied to publications regarding public figures," 726 F.2d at 249, then the verdict would have to be reversed. That standard is the same as that applied by this Court in *Time, Inc. v. Hill, supra,* and thus the Fifth Circuit has reached an incorrect result because it failed to apply *Time, Inc. v. Hill.*

D. The plaintiff was a public figure to the extent of her voluntary, paid participation in a newsworthy entertainment event and therefore the jury's verdict must be reversed because the plaintiff did not meet the proof requirements of New York Times v. Sullivan.

A public figure may be one who has assumed an "influential role in ordering society," or one who has "relinquished . . . [his or her] interest in the protection of [his or her] own good name . . .". *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 164 (1967). Also, public figures include those who are "intimately involved in the resolution of important public questions, or, by reason of their fame, shape events in areas of concern to society at large;" a person may be a "public figure" for a "limited range of issues." *Gertz v. Welch,* 418 U.S. at 351.

Examples of situations in which persons were found to be "public figures" for limited purposes or in connection

with limited activities include *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), (football coach charged by national magazine with fixing a game held to be a public figure); *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265 (3rd Cir. 1979), (professional football player held to be a public figure as to his playing career); *Rosanova v. Playboy Enterprises, Inc.,* 411 F.Supp. 440, aff'd 580 F.2d 859 (5th Cir. 1978), (individual with reputed association with organized crime was public figure despite not having sought such status); *Vandenberg v. Newsweek, Inc.,* 507 F.2d 1024 (5th Cir. 1975), (college track coach held to be public figure for some issues); and *Woy v. Turner,* 533 F.Supp. 102 (N.D. Ga. 1981) (fact issue held to exist as to whether plaintiff was public figure for purposes of activities as a sports agent); see also *El Paso Times Co. v. Trexler,* 447 S.W.2d 403 (Tex. 1969) in which a college professor was held to be a public figure for certain purposes.

Activities which create limited "public figure" status are analogous to those which create a waiver of the right of privacy. To whatever degree and in whatever connection a person's life has ceased to be private, before the publication under consideration was made, to that extent the person has sacrificed any right to restrict public disclosure. *Hurley v. Northwest Publications, Inc.,* 273 F.Supp. 967 (D. Minn. 1967); *Man v. Warner Brothers, Inc.,* 317 F.Supp. 50 (S.D. N.Y. 1970); and *El Paso Times, Inc. v. Trexler,* 447 S.W.2d 403 (Tex.Sup. 1969).

To the extent that Mrs. Braun attracted attention to herself by appearing in Aquarena performances and permitting her likeness to be used in advertising and publicity to promote the attraction throughout the country, she sac-

rificed any right to restrict public disclosure and became a limited "public figure" for the purpose of discussion of those activities. The same picture of her that appeared in *Chic* magazine also appeared in various other publications and advertisements, and could be purchased for the price of a postcard. *Gertz v. Welch* reasoned that a private person, even one involuntarily associated with a matter of general interest, has less likelihood of securing access to channels of communication sufficient to rebut falsehoods concerning him, than do public officials and public figures "and has not voluntarily placed himself in the public spotlight." 418 U.S. 337-8, 344. Mrs. Braun, however, voluntarily sought and was compensated for the notoriety she received and had sufficient access to the media effectively to rebut falsehoods connected with that notoriety. See *Wolston v. Readers Digest Ass'n, Inc.,* 443 U.S 157, 171 (1979). The picture in *Chic* did nothing more than portray her exactly as she had appeared in postcards, advertisements, and other publicity about this acclaimed act. Having sought and achieved public figure status for the purpose of promoting and presenting the act, Mrs. Braun was required to discharge the burden of proof imposed by *New York Times v. Sullivan,* and the Fifth Circuit held that if that burden of proof applied, the jury's verdict would have to be reversed. 726 F.2d at 249.

E. The plaintiff did not satisfy the burden of proof under any test.

Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 811, 819-820, applied *Gertz v. Welch, supra,* and *Time v. Firestone,* 424 U.S. 448 (1976) to Texas law and adopted a simple negligence standard to support recovery by a private individual in a defamation action. This requires that the plaintiff establish that the publisher or broad-

caster knew or should have known that the defamatory statement was false, with the caveat that "the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon 'a factual misstatement whose content [would] not warn a reasonably prudent editor or broadcaster of its defamatory potential.' " *Ibid.;* see also *A. H. Belo Corp. v. Rayzor,* 644 S.W.2d 80. The proof does not sustain the finding of defamation or "false light"[7] in this case under either this more relaxed standard or the requirements of *New York Times v. Sullivan.*

The Fifth Circuit panel applied an elastic "context" argument to support the finding. It recognized that under Texas law the court must make a threshold determination whether the publication is capable of conveying defamatory or false meaning. 726 F.2d at 253. Even though the court conceded that there was nothing false, demeaning, changed, distorted, offensive or wrong with either the subject picture or caption, 726 F.2d at 245, it held that "the publication of Mrs. Braun's picture in the 'Chic Thrills' section of the magazine was fully capable of conveying a false impression of Mrs. Braun." 726 F.2d at 245. This conclusion was based on the reasoning that an ordinary reader might form an opinion that Mrs. Braun was unchaste or promiscuous, *or* that she approved the opinions

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[7] The Fifth Circuit declined to discuss "various challenges" (including a claim that the evidence did not support the verdict) to the defamation award, stating that the facts of the case and the nature of damages " 'fit more precisely' the false light invasion theory." 726 F.2d at 252. However, the court recognized the similarity between defamation and false light invasion of privacy under the law of Texas and other authorities, 726 F.2d at 250, 252, and relied on Texas defamation cases in its analysis of the evidence. 726 F.2d at 252. Thus, if the evidence does not support a defamation claim, it cannot support a "false light" invasion claim.

expressed in *Chic, or* had consented to having her picture in *Chic,* "[e]ither of [which] findings would support the jury verdict that the publication placed Mrs. Braun in a false light highly offensive to a reasonable person." 726 F.2d at 254, n. 11.

This was error, as there was no proof linking Mrs. Braun with the other contents of the magazine. It is not reasonable to assume that the "ordinary reader" would infer a defamatory meaning from contents which are not "of and concerning" the plaintiff. There is no reasonable basis for imputing unchastity or promiscuity to Mrs. Braun. Nor is there any reasonable basis for inferring, from the picture and caption, that she either consented to the publication of her picture in *Chic* or that she approved the "opinions" expressed in *Chic,* although it is doubtful that either of these implications are defamatory. In short, the proof does not support the jury finding.

F. Summary

No practical dimensions can be fashioned for the legal theory the lower courts have created. Many magazines can be classified as having sexuality as a dominant theme; it is clear that the lower courts judgment means that no such magazine may publish truthful information relating to a newsworthy event, without binding advance consent of every participant in the event, at the risk of the punitive imposition of a damage award. But what about those publications—and there are many—in which sexuality plays a prominent role, through substantive content or advertising, though it may not be the "dominant" theme? Are they to escape the rule, or be subjected to it? And who determines when the prominence given to sexuality causes the loss of the right to publish information relating

to newsworthy events? Will more staid publications, which occassionally feature articles about sex and carry suggestive advertising, be included in th group denied the "newsworthy" privilege? Or will the line be drawn somewhere between *Cosmopolitan* and *Playboy* on the one hand and *Penthouse* and *Playgirl* on the other?

The questions do not stop with publications with sexual or suggestive content, but extend to all facets of social behavior and political or religious belief. If the picture and caption in question had been placed in publications containing material relating to unpopular political or religious beliefs or causes, or social or cultural practices which evoke disgust when judged by standards of Mrs. Braun's peers, would a defamatory inference be drawn that she embraces such beliefs, causes, or practices? If placed in a psychology journal, could it be inferred that Mrs. Braun is mentally deranged? Under the Fifth Circuit's opinion these questions could be answered in the affirmative (see n. 11, 726 F.2d at 254).

The Fifth Circuit's decision conflicts with the decisions of other courts of appeal and this Court as to the constitutional protections afforded publishers in such cases. The principles applied by the Fifth Circuit are dangerous and uncontrollable precedents with great potential to damage First Amendment freedoms. These conflicts justify the grant of certiorari to review the judgments below.

II. The decision below, which affirmed the trial court's placement of the burden of proof of truth on the petitioner, conflicts with the decisions of other courts of

appeals and raises significant and recurring problems concerning the burden of proof of falsity in libel and false light invasion of privacy actions.

The trial court's charge placed the burden of proof on the issue of "falsity" of the allegedly defamatory material on *Chic,* i.e., *Chic* had to prove the "impression" left by the material was not false." R. 296. *Chic's* objection that the burden was improperly placed was overruled. R.23. Thus, the Defendant had the burden of proving that the alleged "impression" whatever that might be, was true.

Allowing a publisher to avoid liability only by proving the truth of all injurious statements does not accord adequate protection of First Amendment liberties; "as the court stated in *New York Times Cov. v. Sullivan, supra* at 297: 'allowance of the defense of truth with the burden of proving it on the defendant, does not mean that only false speech will be deterred'." *Gertz v. Welch,* 418 U.S. 340-41.

The First Amendment requires that the burden of proving falsity of an allegedly libelous statement be placed on the plaintiff, since placing the burden on the defendant would permit the imposition of liability without fault. Unless that burden is properly placed, and sustained, a verdict against the Defendant cannot stand. See *Wilson v. Scripps-Howard Broadcasting Company,* 642 F.2d 371 (6th Cir.), *cert. granted,* 454 U.S. 962, *writ dism'd.* 454 U.S. 1130 (1981); and see *Fitzgerald v. Penthouse International,* 639 F.2d 1076 (4th Cir. 1981). The Fifth Circuit's decision conflicts with those of Texas courts that have held that "the burden of proving falsity rested squarely on the shoulders of the plaintiff." *A.H. Belo v. Rayzor,* 644 S.W.2d 71, 80 (Tex. Ct. App.—2d Dist.

1982, writ ref'd n.r.e.) *Cf. Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 811, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977).

The trial court placed the burden of proving truth on the Defendant. The burden could not have been fulfilled, had Defendant tried, because Plaintiff never took a clearly defined position on the question of what false impression of her had been created. The Fifth Circuit overruled the issue without discussion. A fundamental safeguard of the First Amendment was thus ignored, as were the courts of appeal and Texas courts that had embraced it, and for that reason certiorari should be granted to review the judgment below.

III. The decision below conflicts with the decisions of this court and raises significant and recurring problems concerning the constitutional restrictions for imposing liability for exemplary damages in a false light invasion of privacy case.

The jury instructions in this action did not properly set forth the basis upon which punitive damages can be awarded for false light invasion of privacy consistent with First Amendment guarantees and thus the jury findings will not support the award of $50,000 in punitive damages. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court declared that no punitive damages could be imposed in defamation cases "absent a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349. The Court has defined "reckless disregard" as publishing with serious doubts as to the truth of the statement. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also Bose Corp. v. Consumers Union of U.S.*,

Inc., — U.S. —, 104 S.Ct. 1949, 1965 n.30 (1984). The same principles should apply in the very analogous false light invasion of privacy action.

The special issues and jury instructions in this case do not inquire into Petitioner's subjective awareness of falsity; they are concerned with Petitioner's objective behavior, and, indeed, do not even address the question of knowledge of falsity:

> 5. Do you find that *Chic* acted in willful or reckless disregard of Mrs. Braun's reputation by publishing her picture?
>
> * * *
>
> 11. Do you find that *Chic* acted in willful or reckless disregard of Mrs. Braun's right to be free from unwarranted publicity?

726 F.2d at 258-59. The failure of the jury instructions to properly inquire into the question of subjective knowledge of falsity rendered the judgment awarding the $50,000 punitive damages for invasion of privacy improper. *See Time, Inc. v. Hill*, 385 U.S. 374, 394-97 (1967).

IV. The decision below conflicts with the decisions of this court and raises significant and recurring problems concerning the entry of judgment on the basis of a jury's affirmative finding on an interrogatory inquiring about two separate torts where both cannot be sustained by the evidence.

"False light" and "appropriation" "invasions" are two separate torts with distinct elements of proof and damage. Prosser, *Privacy*, 48 Cal. L.Rev. 383 (1960); *Fogel v. Forbes, supra; Brown v. Boney*, 5 Med.L.Rptr. 1395 (N.C. App. 1979); *Leverton v. Curtis Publishing Co.*,

192 F.2d 974 (3rd Cir. 1951); *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Penn. 1976).

Interrogatory 7, R. 302, inquired as to liability for both torts, but permitted only a single answer. Thus it cannot be said with certainty which tort was found to exist.[8] When one of two claims submitted to a jury should not have been submitted, a general verdict (such as was rendered here in response to the invasion of privacy interrogatory) cannot stand. *United New York and New Jersey Sandy Hook Pilot Ass'n v. Halecki*, 358 U.S. 613, 619 (1959); *Patton v. Wells*, 121 F. 337, 340 (8th Cir. 1903); *Travelers' Ins. Co. v. Wilkes*, 76 F.2d 701, 705 (5th Cir.), cert. denied *sub nom. Hirsig v. Travelers' Ins. Co.*, 296 U.S. 604 (1935); *Fatovic v. Nederlandsch-Ameridaansche Stoomvaart*, 275 F.2d 188, 190 (2d Cir. 1960); *Morrissey v. National Maritime Union of America*, 544 F.2d 19, 26-27 (2d Cir. 1976); and *E. I. Du Pont De Nemours v. Berkley & Co., Inc.*, 620 F.2d 1247, 1257 (1980).

There was no evidence of an "appropriation". The mere appearance of an item or feature in a publication operated for profit is not considered to inure to a defendant's commercial advantage, and does not constitute appropriation. *Leverton v. Curtis Publishing Co., supra; Neff v. Time, Inc., supra.* There must be evidence of an actual appropriation of some particular value inherent in the plaintiff's name or likeness and utilization of that value for the defendant's commercial advantage. *Fogel*

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[8] The Court of Appeals' opinion (on rehearing) concluded that the jury verdict was not based solely on "appropriation." This is pure speculation.

v. Forbes, supra; Faucheux v. Magazine Management, supra. There was no such evidence in this case.

The same deficiencies are present with respect to interrogatory 10, R. 303, inquiring as to damages for "invasion." *Guccione v. Hustler*, 7 Med.L.Rptr. 2077 (Ohio App. 1981) demonstrates that the elements of damage for "appropriation" are different than those for "false light" invasion. But those elements were not defined by the trial court in this case, and there is no way to tell whether the jury intended to compensate for the one tort, or the other, or both. As said by the Supreme Court in the *Halecki* case, 358 U.S. 619: "a new trial [is required] for there is no way to know that the invalid claim . . . was not the sole basis for the verdict."

These conflicts justify the grant of certiorari to review the judgment below.

V. The decision below raises significant and recurring problems concerning the effect of consent.

Consent to publication of any matter, either that which is personally defamatory or that which invades privacy, creates an absolute privilege so long as the publication does not exceed the scope of the consent. *Restatement (2d) Torts*, Sec. 652f, Comment b (1977); *Castagna v. Western Graphics Corporation*, 590 P.2d 291 (Ore. App. 1979); *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719 (Tex.Civ.App.-Eastland, 1975, n.r.e.).

In this case, consent is undisputed. Mrs. Braun gave permission to Aquarena to use her photographs in advertising and publicity. No limitation was imposed on the type of advertising or publicity. It was stipulated (in the

photographer's release) only that the photos be in good taste. The photograph in question was approved by Mrs. Braun for use by Aquarena, and Aquarena consented to publication of the photo by *Chic*.

There is no claim that the scope of consent was exceeded. Rather, it is claimed that consent was obtained as a result of misrepresentation.

If the person consenting to the conduct of another is induced to do so by the other's misrepresentation, the consent is not effective as to the unexpected invasion or harm. *Restatement (2d) Torts*, Sec. 892b(2) (Tent. Draft No. 18, 1972). *Castagna v. Western Graphics Corporation, supra.* In such event, however, any right of action that may rest with the individual giving consent is not based on defamation or libel, or invasion of privacy, which were waived by the giving of the consent, but must be based upon the alleged misrepresentation and unexpected invasion or harm resulting from it. *Castagna v. Western Graphics Corporation, supra; McAdam v. The Ridge Press, Inc.*, 394 N.Y.S. 2d 202 (N.Y. Sup.App.Div. 1977); and see *Falwell v. Penthouse, supra.*

Any right of action by Mrs. Braun, therefore, lies against Aquarena, and must be based on breach of express or implied terms of the consent given Aquarena. Aquarena is the only party in position to assert that consent was induced by misrepresentation, and to recover against *Chic* for "unexpected invasion or harm" (which might include loss by virtue of a claim by Mrs. Braun against Aquarena).

Even if Mrs. Braun could assert Aquarena's claim directly against *Chic*, that claim is still required to be

based on unexpected harm from alleged misrepresentation. Her claims were not structured in this manner. Certiorari should be granted to clarify this area.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition should be granted, and the Judgment of the Fifth Circuit Court of Appeals should be reversed and Judgment rendered in Petitioner-Defendant's favor, or, alternatively, reversed and the cause remanded.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-77-CA-242

ED BRAUN, ET AL

vs.

CHIC MAGAZINE, INC.

JUDGMENT

(Filed April 21, 1982)

On April 19, 1982, came on to be heard the above cause, wherein Ed Braun and his wife, Jeanie Braun, are plaintiffs and Chic Magazine, Inc., is the defendant. Plaintiffs and defendant announced ready for trial, and, a jury having been demanded, there came a jury of six persons, to-wit: Dennis A. Johnson, and five others, who, after duly selected, empaneled and sworn, heard the pleadings of the parties and the evidence in support thereof. At the conclusion of the evidence the Court charged the jury touching all matters of law regarding this cause and submitted said cause to the jury on special interrogatories. After argument of counsel, the jury retired to consider the special interrogatories and their answers thereto and on April 20, 1982, the jury returned into open Court their answers to the special interrogatories as more fully appears in the verdict form of the Court on file herein, to which reference is hereby made for all purposes.

The jury's verdict was received and accepted by the Court and the jury was ordered discharged on April 20, 1982. Based upon the jury's verdict and the uncontroverted facts, the Court is of the opinion that plaintiffs are entitled to recover judgment against the defendant.

Accordingly, it is ORDERED, ADJUDGED and DECREED by the Court that plaintiff, Jeanie Braun, do have and recover of and from the defendant, Chic Magazine, Inc., the sum of $95,000.00, with interest thereon according to law from the date hereof until paid, for which amount execution may issue.

It is further ORDERED, ADJUDGED and DECREED by the Court that all costs incurred in this cause be, and the same are hereby, taxed against the defendant for which amount execution may issue.

The defendant in open Court duly excepted to this judgment.

Signed and entered this 21st day of April, 1982.

/s/ Lucius Buxton,
Presiding Judge
United States District Court
Western District of Texas

Approved As To Form:

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APPENDIX B

Ed BRAUN, et al.,

Plaintiffs-Appellees,

v.

Larry C. FLYNT,

Defendant,

CHIC Magazine, Inc.,

Defendant-Appellant.

No. 82-1235.

United States Court of Appeals,
Fifth Circuit.

March 9, 1984.

Novelty entertainer who performed act with swimming pig at amusement park brought defamation and invasion of privacy action based upon publication of her picture in men's magazine. The United States District Court for the Western District of Texas, Lucius Desha Bunton, III, J., entered judgment in favor of entertainer, and magazine appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) novelty entertainer was not "public figure," and thus, "actual malice" standard was not applicable; (2) entertainer could not recover for same damages under both defamation and invasion of privacy theories; (3) reasonable jury could have found that publication of entertainer's picture put her in false light and thus invaded her privacy; (4) jury was properly allowed to consider entire magazine in determining whether false impression was created; (5) evidence supported

finding that magazine misrepresented its true nature in obtaining release to publish picture; and (6) actual damages of $15,000 and punitive damages of $50,000 were not excessive.

vacated and remanded.

Politz, Circuit Judge, specially concurred and filed statement.

1. Constitutional Law 90.1(1)

Publications alleged to constitute invasions of privacy merit same constitutional protections as do publications alleged to be defamatory. U.S.C.A. Const.Amend. 1.

2. Libel and Slander 48(1), 51(5)

Female entertainer who worked in amusement park novelty act with a swimming pig was not a "public figure," notwithstanding that her job brought her limited public exposure, and thus, "actual malice" standard was not applicable in her libel action against magazine which published her picture. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

3. States 4.2

It is task of state to define standard of liability for defamation of private individual; states are not free, however, to impose liability without fault, nor are they free to award compensation greater than actual injury suffered by plaintiff.

4. Damages 49.10

Libel and Slander 117,119

Torts 8.5(1)

Under Texas law, plaintiff was entitled to recover actual damages for mental anguish and for impugnment of her reputation under either defamation or invasion of privacy theory.

5. Action 38(4)

Plaintiff could not recover for same embarrassment and humiliation caused by publication of her photograph in magazine under both defamation and invasion of privacy actions, nor could she recover punitive damages under both theories, where conduct upon which each award was based was the same; regardless of separate theories of action, only single recovery for any item of damages could be allowed.

6. Libel and Slander 123(2)

Although, under Texas law, court must make threshold determination whether complained-of publication is capable of conveying defamatory or false meaning, whether publication does actually place subject in false light and whether that false light would be highly offensive to reasonable person are questions of fact.

7. Torts 27

In invasion of privacy action premised upon placing novelty entertainer in "false light" in the public eye, evidence supported conclusion that publication of entertainer's photograph in men's magazine was capable of conveying

false impression of entertainer which would be highly offensive to reasonable person, and thus, reasonable jury could conclude that entertainer's right to privacy under Texas law had been violated.

8. Libel and Slander 103

Torts 27

In defamation and invasion of privacy action arising from publication of novelty entertainer's photograph in men's magazine, entire magazine, and not merely picture and caption relating to entertainer, was properly considered by jury in determining whether entertainer was presented in false light under Texas law, since context and manner in which picture appeared determined to large extent effect which it would have on person reading or seeing it. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

9. Libel and Slander 112(1)

Torts 27

In defamation and invasion of privacy action arising from publication of novelty entertainer's photograph in men's magazine, evidence supported finding that representative of magazine misrepresented its true nature to entertainer's employer, and that valid consent to publish was thus not obtained.

10. Libel and Slander 74

Torts 21

Where novelty entertainer's employer, acting in good faith, gave fraudulently induced consent to magazine's publication of entertainer's picture, entertainer could main-

tain direct action for defamation and invasion of privacy against magazine for allegedly placing her in false light, and was not restricted to action against employer for breach of contract that employer's release of any pictures not be embarrassing to her or her family.

11. Libel and Slander 121(1)

Torts 27

In defamation and invasion of privacy action arising from publication of novelty entertainer's picture in men's magazine, evidence of embarrassment and humiliation caused by publication and publication's effect on entertainer's emotional stability supported actual damage award of $15,000 under Texas law.

12. Libel and Slander 120(2)

Under Texas law, punitive damages are proper in libel action upon showing of recklessness or malice.

13. Libel and Slander 123(6)

Under Texas defamation law, whether publisher acted with malice is jury question.

14. Libel and Slander 112(2)

In defamation and invasion of privacy action arising from publication of novelty entertainer's picture in men's magazine, evidence supported finding that magazine was actually aware that use of picture would create false impression of entertainer, and that it consciously deceived entertainer's employer for purpose of obtaining picture, and thus, magazine acted with "malice," thereby entitling entertainer to punitive damages under Texas law.

15. Libel and Slander 121(1)

In defamation and invasion of privacy action arising from publication of novelty entertainer's picture in men's magazine, award of $50,000 in punitive damages, only slightly more than three times actual damages, was not excessive under Texas law.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ and JOLLY, Circuit Judges, and Hunter*, District Judge.

E. GRADY JOLLY, Circuit Judge:

This action arising in diversity involves suit by Jeannie Braun, a resident of Texas, against Larry C. Flynt, an Ohio resident, and Chic Magazine, Inc., an Ohio corporation, growing out of the alleged unauthorized, libelous publication in the December 1977 issue of *Chic* of Mrs. Braun's picture. On special interrogatories the jury found for Mrs. Braun as to defamation and invasion of privacy and returned actual and punitive damages on both grounds. We reverse and remand.

I.

The dominant theme of *Chic* magazine is "female nudity." According to *Chic's* editor, the magazine depicts "unchastity in women." The associate editor admitted that the caricatures found in the magazine are "indecent."

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*District Judge of the Western District of Louisiana, sitting by designation.

The particular issue of the magazine with which the case is involved contained numerous explicit photographs of female genitalia. Suffice it to say that *Chic* is a glossy, oversized, hard-core men's magazine.

One of the opening sections of the magazine, entitled "Chic Thrills," contains brief stories about current "events." In the issue of the magazine in question, twenty-one vignettes were included in "Chic Thrills." Most of these either concerned sex overtly or were accompanied by a photograph or cartoon of an overtly sexual nature.

This is the context in which Mrs. Braun's picture was published. Mrs. Braun was employed by Aquarena Springs amusement pary in San Marcos, Texas. Part of Mrs. Braun's job included working in a novelty act with "Ralph, the Diving Pig." In the act, Mrs. Braun, treading water in a pool, would hold out a bottle of milk with a nipple on it. Ralph would dive into the pool and feed from the bottle.

Pictures and postcards were made of Ralph and Mrs. Braun's act, showing Ralph, in good form, legs fully extended, tail curled, diving toward Mrs. Braun, who is shown in profile holding the bottle.

Mrs. Braun had signed a release authorizing Aquarena Spring's use of the picture. The release provided that

> I [Jeannie Braun] in consideration of the fact that I am employed and paid by Aquarena, Inc., agree as part of my employment that all photos taken of me can be used by Aquarena Springs and their advertising and publicity agents. It is to be understood that all photographs are to be in good taste and without embarrassment to me and my family.

In May 1977 an editor of the "Chic Thrills" section, Henry Nuwer, went to the amusement park and saw Ralph and Mrs. Braun. He saw the postcard and thought that it should be included in "Chic Thrills." In keeping with *Chic's* strict policy of obtaining the consent of persons whose pictures appear in "Chic Thrills," Mr. Nuwer called Ms. Jennifer Benton, Aquarena's public relations director, and requested transparencies or negatives of Ralph. Ms. Benton, who was not familiar with *Chic,* inquired about the nature of the magazine. Mr. Nuwer testified at trial that he told Ms. Benton that *Chic* was a men's magazine containing men's fashion, travel and humor. According to Mr. Nuwer, "the idea of nudity never came up." According to Ms. Benton, Mr. Nuwer never mentioned that it was a men's magazine but told her that the magazine was a "fashion magazine" with travel articles in it and that it had "the same clientele that would read a *Redbook* or *McCall's.*"[1] Ms. Benton thereafter sent some negatives to Mr. Nuwer and the picture was run, with caption, in the December 1977 issue of *Chic.*[2]

On the same page on which Mrs. Braun's picture appeared were stories about "10 Things That P--- Off Women" with an accompanying cartoon of a woman whose large breasts are partially exposed; a story entitled

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1. The same clientele indeed; in the sense that both sets of readers were featherless bipeds.

2. The caption read: "SWINE DIVE—A pig that swims? Why not? This plucky porker performs every day at Aquarena Springs Amusement Park in bustling San Marcos, Texas. Aquarena staff members say the pig was incredibly easy to train. They told him to learn quick, or grow up to be a juicy ham sandwich."

"Mammaries Are Made Of This" about men whose breasts have been enlarged by exposure to a synthetic hormone, with an accompanying cartoon showing a man with large breasts; and a story entitled "Chinese Organ Grinder" about the use of sexual organs from deer, dogs and seals as a Chinese elixir. On the facing page is a picture showing a nude female model demonstrating navel jewelry and an article on "Lust Rock Rules" about a "throbbing paean" to sex written by "the Roman Polanski of rock." The cover of the issue shows a young woman sitting in a chair with her shirt open so as partially to reveal her breasts, one hand to her mouth and the other hand in her tightly-fitting unzipped pants.

Mrs. Braun learned of her inclusion in *Chic* on November 23, 1977, when she stopped at a drive-in grocery store in Maxwell, Texas, which lies between San Marcos and her home town of Lockhart, Texas. She walked into the store and a stranger walked up to her and said, "Hey, I know you," explaining that he recognized her from her picture in *Chic*. Mrs. Braun stated that

> . . . [H]e went and got the magazine. And I stood there because I was really really terrified. I thought something is going to happen, my picture is not in this magazine. My legs were like jelly, I couldn't untrack. I was petrified. And he was thumbing through these pictures. I was raised in a private Catholic school and I had never seen anything like this. And I was terrified, I didn't know what he had in mind. I thought something horrible was going to happen to me. He flipped through that book and my picture was in that book. I didn't believe it. I stood there like a dummy.

Mrs. Braun testified that she "was very upset" and "felt like crawling in a hole and never coming out." She

stated that she did not want to return to work, and that she suffered "embarrassment and humiliation."[3]

II.

Three weeks after she discovered her picture in *Chic*, Mrs. Braun filed this lawsuit against Larry Flynt, the publisher, and *Chic*, alleging invasion of privacy, slander and libel. The Brauns sought $100,000 actual and $1,000,000 punitive damages.

Trial was held April 19-20, 1982,[4] before a six-person jury. The jury returned damages for defamation of $5,000 actual and $25,000 punitive and damages for invasion of privacy of $15,000 actual and $50,000 punitive for a total of $95,000. In answering twelve special interrogatories,[5] the jury found, based on a preponderance of the evidence, that "a false impression as to Mrs. Braun's reputation, integrity or virtue" had been created and that *Chic* knew or should have known that such a false impression was created; that *Chic* had acted willfully and with reckless disregard for Mrs. Braun's reputation by publishing her

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3. *Chic* presented evidence to the jury showing that Mrs. Braun participated as a "barrel racer" at a local rodeo on the same night that she discovered her picture in *Chic*.

4. The case was tried twice. At the conclusion of the evidence in the first jury trial in February 1982, the court dismissed Larry Flynt upon his motion for a new trial. When the jury was unable to arrive at a verdict, the court declared a mistrial.

Mrs. Braun's husband, Ed Braun, in whose name the case was brought, did not seek damages and none were awarded him. Texas does not recognize a relational right to privacy or to recover for defamation. *Moore v. Charles B. Pierce Film Enterprises*, 589 S.W.2d 489, 491 (Tex.Civ.App. 1979).

5. See Appendix with special interrogatories.

picture; that *Chic* had "published Mrs. Braun's picture in a manner highly offensive to a reasonable person" and that *Chic* had not received valid consent from Aquarena Springs to publish the picture.

Chic filed timely notice of appeal under 28 U.S.C. § 1291.

III.

We turn initially to the determination of whether *Chic's* publication of Mrs. Braun's picture with piglet merits protection under the rigorous first amendment standard applied to publications regarding public figures. If such protection were due, as *Chic* strenuously claims, the verdict below would have to be reversed.

[1, 2] The protection due publishers by the first amendment against claims of libel has progressed from the first "modern" case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), through *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), and subsequent cases. It is clear that publications alleged to constitute invasions of privacy merit the same constitutional protection as do publications alleged to be defamatory. *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974). We hold that *Chic's* publication of Mrs. Braun's picture is not entitled to constitutional protection under those standards.

New York Times v. Sullivan established that where public officials seek damages for libel there must be a showing of publication with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether is was false or not." 376 U.S. at 279-80, 84 S.Ct.

at 726. In sum, a showing of mere negligence in publishing an untruthful and defamatory article would no longer suffice to support damages in libel actions brought by a public official.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the Supreme Court extended *New York Times v. Sullivan's* "actual malice" standard to defamation cases brought by public figures. Various definitions of what constitutes a public figure were offered. Public figures include those who have assumed an "influential role in ordering society" or one who has "relinquished . . . [his or her] interest in the protection of [his or her] own good name. . . ." Also, public figures include those who are "intimately involved in the resolution of important public questions, or, by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164, 87 S.Ct. at 1996 (1967) (Warren, C.J., concurring in result). In *Gertz*, which laid to rest consideration of the newsworthiness of the publication in determining the standard of liability,[6] the Court set forth the following rubric:

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6. This alternative consideration had been forwarded by the Court primarily in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), in Justice Brennan's plurality opinion, which held that the *New York Times v. Sullivan* "actual malice" standard should extend to cases involving private persons if the publication involved matters of general or public interest. "If a matter is a subject of public or general interest, it cannot become less so merely because a private individual is involved, or because in some sense the individual did not voluntarily choose to become involved." 403 U.S. 43, 91 S.Ct. at 1819. *Gertz* rejected *Rosenbloom's* basis, finding that the "self-help" available to public persons to combat false publication was not available to private persons and that the public figure has, in most instances, willingly invited "attention and comment" whereas the private person has not. 418 U.S. at 344-45, 94 S.Ct. at 3009.

> That designation [as public official/public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

418 U.S. at 351, 94 S.Ct. at 3012-13.

Under these various definitions, Mrs. Braun clearly was not a public figure. It is true that she voluntarily undertook a public job; however, the mere fact that she had limited public exposure does not suffice to expose her to the increased burdens and lessened protections of those who fall within the *Gertz* standard. She was involved in no public controversy and had no hand in determining the outcome of any important public issue. She certainly cannot be said to have relinquished interest in protecting her name and reputation by force of her limited role as an entertainer. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston v. Reader's Digest Assn, Inc.*, 443 U.S. 157, 167, 99 S.Ct. 2701, 2707, 61 L.Ed.2d 450 (1979).

We therefore conclude that Mrs. Braun is a private individual and that *Chic* is not entitled to the protection of the first amendment applicable to public figures as such standard was enunciated by *New York Times v. Sullivan* and its progeny.

IV.

[3] In determining the standard to be applied here, we start with the premise that *Gertz* leaves to the states

the task of defining a standard of liability for the defamation of a private individual. The states are not free, however, to impose liability without fault, nor are they free to award compensation greater than the actual injury suffered by a plaintiff. 418 U.S. at 348-49, 94 S.Ct. at 3011-12.

Because the prospect of punitive damage awards might tend to inhibit the exercise of legitimate first amendment rights, the Court in *Gertz* held that the states could not allow such awards in the absence of recklessness or actual knowledge of falsity. The states' interest in protecting private individuals from defamation was held not to extend to "securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349, 94 S.Ct. at 3012. *Gertz* allows only those remedies which go "no farther than is necessary to protect the legitimate interest involved." *Id.*

In this case, we are faced with a single wrongful publication which has given rise to two separate causes of action under Texas law. Moreover, the plaintiff was allowed to recover damages under both theories even though the two actions contain identical elements of damages. It has become obvious, with the expansion of privacy law, that a "false light" invasion of privacy action will often arise from the same circumstances which yield a cause of action for defamation. Federal courts have frequently noted the similarities between the two causes of action and have often carried over elements of state defamation law into their consideration of false-light invasion actions. *Rinsley v. Brandt,* 700 F.2d 1304, 1307 (10th Cir. 1983); *Fogel v. Forbes, Inc.,* 500 F.Supp. 1081, 1088 (E.D. Pa.

1980); *Cibenko v. Worth Publishers, Inc.*, 510 F.Supp. 761, 766 (D.N.J. 1981).

[4] The policy which motivates the holding of *Gertz* requires that there be only a single recovery where the same items of damages are alleged under both defamation and invasion of privacy theories. We must, therefore, look to the jury awards in this case to determine if Mrs. Braun has been doubly compensated for her injuries. Although we recognize that the principal element of injury in a defamation action is impairment of reputation, while an invasion of privacy claim is founded on mental anguish, under Texas law, Mrs. Braun was entitled to recover actual damages for mental anguish under both causes of action. *Wood v. Hustler Magazine, Inc.*, No. H-81-186 — F.Supp. — (S.D.Tex. Mar. 1, 1983); *First State Bank v. Ake*, 606 S.W.2d 696, 705 (Tex.Civ.App. 1980). She was also entitled to recover actual damages for the impugnment of her reputation under either theory. *See Time, Inc. v. Hill*, 385 U.S. 374, 386 n. 9, 87 S.Ct. 534, 541 n. 9, 17 L.Ed.2d 456 (1967). The elements of damages allowed under the two actions are overlapping.[7]

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7. The jury in this case was instructed as follows with respect to damages:

> In order to recover damages to compensate for the defamation, Mrs. Braun must show that she has suffered or will suffer an impairment of her reputation or standing in her community, personal humiliation or mental anguish and suffering as a direct result of the publication of her picture in *Chic*.
>
> . . . .
>
> If you find that Mrs. Braun's privacy was wrongfully invaded, then you may consider an award of compensatory

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[5] Having examined the jury instructions and the special verdict in this case, we find that the elements constituting the basis of damages of each of the two causes of action were not sufficiently distinguished from one another to assure that there was no double compensation. Indeed, from the evidence offered on the damage issue, it is, as a practical matter, impossible to distinguish between damages Mrs. Braun suffered from defamation and from invasion of privacy. Very little evidence was offered to show that Mrs. Braun's reputation in her community actually was harmed by the publication, nor was there evidence of tangible economic damage to Mrs. Braun. The evidence supporting the award of damages in this case deals almost exclusively with Mrs. Braun's personal pain and suffering over the appearance of her photograph in *Chic*. Thus it would appear that the jury, in making the award based on Mrs. Braun's defamation cause of action, was primarily compensating her for the embarrassment and humiliation she suffered, the same harms for which the jury was instructed to compensate her under the invasion of privacy cause of action. The $5,000 award for defamation was made in response to an interrogatory regarding damage to reputation; however, the jury was instructed that it could consider Mrs. Braun's personal humiliation, mental anguish and suffering in making both the defamation and invasion of privacy awards. Because of the manner in which the jury was instructed, it is im-

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damages. Do not consider the elements of the cause of action for defamation in awarding damages for invasion of privacy. In awarding compensatory damages, you may consider Mrs. Braun's personal humiliation, mental anguish and suffering.

possible for us to determine to what exact extent the compensatory damage awards are overlapping. In view of the jury instructions, however, and the evidence presented, we are convinced that there is a substantial likelihood that the defamation award, at least in part, was intended to compensate Mrs. Braun for harms also compensated for by the invasion award.

With respect to punitive damages awarded for loss of reputation, we are persuaded beyond any doubt that they duplicate those awarded for invasion of privacy. The conduct upon which each award was based is the same; *Chic's* misrepresentations to the personnel of Aquarena Springs and its reckless disregard for the false impression its publication created of Mrs. Braun. *See infra* IV. B. Additionally, public policy reasons which support the award of punitive damages in libel actions do not justify punitive damages under both causes of action; that is, punitive damages seek to punish and to prevent future occurrences of a type of conduct, and here, punitive damages on one cause of action clearly fulfills that purpose. Indeed, it is doubtful whether we could ever uphold an award of punitive damages for both invasion of privacy and defamation based on the same reckless conduct.

Given our determination that there can be only a single recovery for any item of damages in a case such as this one, we are compelled to remand the case for a new trial on damages. To do so is the only way to guarantee that Mrs. Braun is compensated to the fullest extent allowed by law. On the evidence presented in the record before us, however, it appears that Mrs. Braun, on retrial, would be able to prove only nominal damages for loss of reputation independent of that for which she

has been compensated for invasion of privacy. If so, retrial would be futile. This decision, however, is not one which we are free to make for the plaintiff; but the plaintiff has the alternative of accepting the compensatory damage award with respect to one of her causes of action. We can uphold one of the awards without running afoul of the rights of *Chic* against a double recovery. This is true because the jury was appropriately instructed with respect to the actual elements of damages allowable separately under each cause of action; it is merely the confluence of the two which infects the verdict and award in this case. We would, therefore, be able to uphold an entry of judgment on one of the compensatory awards and the correlative punitive damages if the jury's verdict is otherwise supportable in law and fact. Because the facts of this case and the nature of the damages suffered—primarily, personal humiliation, embarrassment, pain and suffering—fit more precisely the "false light" invasion of privacy theory than they do the defamation theory, we review the invasion of privacy award.[8] If Mrs. Braun elects to waive her right to retrial, no further appeal by *Chic* will be necessary. We accordingly do not reach the various challenges which *Chic* raises to the defamation award. *See, e.g., National Bank of Commerce v. Shaklee Corp.*, 503 F.Supp. 533 (W.D.Tex.1980); *Synercom Technology, Inc. v. University Computing Co.*, 474 F.Supp. 37 (W.D.Tex.1979).

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8. Our conclusion in this regard is amply buttressed by the jury verdict which focused primarily on damages for invasion of privacy. Of course, if Mrs. Braun does not waive her right to retrial, she has the right to insist that she should receive the maximum compensation permitted by our holding.

V.

The question to which we now turn is whether the evidence supports the jury verdict finding *Chic* liable to Mrs. Braun for invasion of privacy under Texas law. In our analysis, because of the paucity of Texas cases concerning false-light invasion of privacy and because of the similarity of the two causes of action, we will, as have other jurisdictions, rely to some extent on Texas defamation cases.

A.

There are four separate and distinct causes of action under Texas law which spring from the individual's right of privacy. *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex.1979). *See Billings v. Atkinson*, 489 S.W.2d 858 (Tex.1973); *Gill v. Snow*, 644 S.W.2d (Tex. App.1982). The branch of privacy law under which Mrs. Braun recovered involves the right of an individual to be free from publicity which places her in a false light in the public eye. The *Restatement (Second) of Torts* §(652(e) (1977) provides that:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
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> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The special verdict indicates that the jury found both that *Chic* published Mrs. Braun's picture in a manner highly

offensive to a reasonable person, that *Chic* acted in wilful or reckless disregard of Mrs. Braun's right to be free from unwarranted publicity, and that *Chic's* publication created a false impression of Mrs. Braun. *See* Appendix. Having examined the record, we hold that a reasonable jury could conclude that Mrs. Braun's right to privacy under Texas law had been violated.

B.

Although we find no Texas cases directly on point, our examination of Texas defamation law and the law of privacy in other states which have adopted the Second Restatement formulation, as Texas has,[9] convinces us that *Chic* is liable to Mrs. Braun for its publication of her picture.

[6] Although under Texas law the court must make a threshold determination whether the complained-of publication is capable of conveying defamatory or false meaning, *Golden Bear Distribution Sys. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir.1983), whether the publication does actually place the subject in a false light and whether that false light would be highly offensive to a reasonable person are questions of fact. *Rinsley v. Brandt*, 700 F.2d at 1307; *Martin v. Municipal Publications*, 510 F.Supp. 255 (E.D.Pa.1981); *Raymer v. Doubleday & Co.*, 615 F.2d 241, 246 (5th Cir.) *cert. denied*, 449 U.S. 838, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980) (libel action; applying Texas law). The Texas Supreme Court set forth the standard in *Cotulla v. Kerr*, 74 Tex. 89, 11 S.W. 1058 (Tex. 1889):

> In the absence of doubt or ambiguity growing out of the language used in the publication, we understand

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9. *Justice v. Belo Broadcasting Corp.*, 472 F.Supp. at 146-47.

> it to be the duty of the court to determine and instruct the jury whether or not it is libelous; but, where there is uncertainty or doubt, it is the duty of the court to give the jury a definition of what is a libel, and leave it for the jury to say whether the offense has been proved.
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> *Id.* at 1059.

[7] Although *Chic* urges the contrary position, we hold that the evidence in this case supports the conclusion that the publication of Mrs. Braun's picture in the "Chic Thrills" section of the magazine was fully capable of conveying a false impression of Mrs. Braun. Similarly we are unpersuaded by *Chic's* argument that no reasonable person would find the publication of Mrs. Braun's picture in that context to be both false and highly offensive. Having examined the evidence presented, we hold that a reasonable person could have arrived at the same conclusion as did the jurors in this case. In reaching our conclusion, we have remained ever mindful that we sit as a court reviewing the verdict of Mrs. Braun's peers; we do not, cannot, and should not sit as jurors whose job it is ultimately to determine whether the publication was false and offensive.

C.

[8] *Chic* urges that its publication of Mrs. Braun's picture was substantially true and that Mrs. Braun failed to establish falsity, a necessary element of the false-light invasion of privacy action. *Chic* argues that the picture and caption should have been considered by the jury separately and apart from the other portions of the magazine in determining whether they created a false impression of Mrs. Braun. This argument was raised

before the district court in *Chic's* motion in limine to exclude from the jury the "unrelated contents" of the magazine. The court denied the motion and held that the entire magazine could be considered by the jury. Thus, in determining whether Mrs. Braun was presented in a false light, we must decide whether the picture of her should have been considered in isolation or in the context of the entire magazine.

In *Golden Bear Distribution Sys. v. Chase Revel, Inc., supra,* the plaintiff Golden Bear Distributing Systems of Texas brought suit for defamation against the defendant's magazine, *Entrepreneur,* arising from an article which, by confusing Golden Bear of Texas with Golden Bear of California, created the *impression* that Golden Bear of Texas had engaged in various fraudulent investment practices. The article had, in fact, stated that only Golden Bear of California had defrauded investors. but in the *context* of the article the accusation spilled over onto Golden Bear of Texas.

The defendant in *Golden Bear* first argued, as here, that only the portion of the article dealing with Golden Bear of Texas was relevant and secondly, that because those sections relating to Golden Bear of Texas were true, the article could not be considered defamatory.

This court rejected both arguments. First, we held that the *entire* article must be submitted to the jury and that the sections pertaining to Golden Bear of Texas must be considered in context. "The allegedly defamatory publication must be construed as a whole. If a defamatory meaning *may* exist, . . . the court must allow the jury to determine whether an ordinary reader would perceive the statement as defamatory. *See Raymer v.*

Doubleday & Co., 615 F.2d 241, 246 (5th Cir.) *cert. denied*, 449 U.S. 838, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980) (applying Texas law)." 708 F.2d at 948.[10]

Second, in considering whether the truth of the limited sections of the article pertaining to Golden Bear of Texas was an absolute defense to liability, this court said that "[a]lthough the individual statements printed in the article, if read out of context, were true, the jury found that their *overall effect* was defamatory." 708 F.2d at 949. (Emphasis added.)

The pertinent facts and circumstances alleged here are that Mrs. Braun's picture was placed without her consent in a magazine devoted exclusively to sexual exploitation and to disparagement of women. Mrs. Braun contends, and the jury implicitly found, that the ordinary reader automatically will form an unfavorable opinion about the character of a woman whose picture appears in *Chic* magazine.[11] It was appropriate, therefore, to intro-

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10. *See also H.O. Merren & Co. v. A.H. Belo Corp.*, 228 F. Supp. 515, 518 (N.D.Tex.1964), *aff'd*, 346 F.2d 568 (5th Cir. 1965); *Taylor v. Houston Chronicle Publishing Co.*, 473 S.W. 2d 550, 554 (Tex.Civ.App.1971); *Hedgpeth v. Garman*, 136 S.W.2d 641, 642 (Tex.Civ.App.1939); *rev'd on other grounds*, 157 S.W.2d 139 (1941) (alleged defamatory publication "must be considered as a whole and in light of all pertinent facts and circumstances alleged in connection therewith"); *Times Publishing Co. v. Ray*, 1 S.W.2d 471, 473 (Tex.Civ.App.1927), *aff'd*, 12 S.W.2d 165 (Tex.1929) (alleged libels must be considered with "reference to their settings").

11. *Chic* argues that no ordinary reader would assume Mrs. Braun to be unchaste or promiscuous on the basis of its publication of her picture. Even if this were true, the jury might have found that the publication implied Mrs. Braun's approval of the opinions expressed in *Chic* or that it implied

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duce the entire magazine so that the jury could in effect, be placed in the position of the ordinary reader. Additionally, as we have learned from *Golden Bear,* the truth of the pictures depends upon the overall impression created by them in the context in which they were published.

According to *Chic's* argument, context has no bearing on whether Mrs. Braun was libeled; we should cut out Mrs. Braun's picture and look solely at it to determine whether she had been defamed or cast in false light. Common sense dictates that the context and manner in which a statement or picture appears determines to a large extent the effect which it will have on the person reading or seeing it.

Texas law supports a realistic view which not only allows but requires presentation of proof which comports with the world outside the courtroom. That is where and how the alleged defamation occurred. If the construction which the ordinary reader would give to Mrs. Braun's picture depended solely on her picture, then the proof should have been limited solely to her picture. That is not the case, however. We cannot therefore find that the court erred in admitting the entire magazine into evidence.[12]

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Mrs. Braun had consented to having her picture in *Chic.* Either of these findings would support the jury verdict that the publication placed Mrs. Braun in a false light highly offensive to a reasonable person.

12. A related issue pertaining to exclusion of the other portions of the magazine involves exclusion under Fed.R.Evid.

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D.

Chic urges that under Texas's law of defamation, consent by an individual to publication of his or her picture for commercial purposes is a defense to libel. *Kimbrough v. Coca-Cola, Inc.*, 521 S.W.2d 719, 721 (Tex.Civ. App.1975). As stated in PROSSER, LAW OF TORTS § 18 at 101 (4th ed. 1971), consent viewed more acutely is not a defense per se but "goes to negative the existence of any tort in the first instance." As Prosser goes on to note, however: "If the plaintiff manifests consent to the defendant's act under a mistake as to its nature or character, the consent will still be effective, unless the defendant is aware of the mistake and takes advantage of it, as where he has misrepresented the matter to the plaintiff." *Id.* at 105.

[9] The jury expressly found that Mr. Nuwer misrepresented the true nature of the magazine to Ms. Benton and that consent was not obtained.[13] While there was

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(Continued from previous page)

403, which allows the court in its discretion to bar relevant evidence whose "probative value is substantially outweighed by the danger of unfair prejudice. . . ." It is true that *Chic qua Chic* was not on trial. It is also true that the evidentiary impact of the other portions of the magazine was significant, but we cannot say that it was *unfairly* prejudicial so as to outweigh its probative value. Here, as in *Golden Bear*, the context was everything. The court instructed the jury that it was not to be "governed by bias, prejudice, sympathy, or public opinion. . . ." We do not find that the court erred in refusing to exclude the magazine under Rule 403.

13. *See* Appendix, special interrogatory number 9. *See also Wood v. Hustler Magazine, Inc., supra*, at ——-—— for a discussion of the elaborate, though there insufficient, measures by which *Hustler*, a companion Larry Flynt publication to *Chic*, obtains consent.

some dispute as to the exact nature of Mr. Nuwer's representation, sufficient evidence was presented at trial to support the jury's finding.[14]

[10] *Chic* cites Virginia,[15] Oregon[16] and New York[17] cases for the proposition that, because the jury found that consent was deceitfully induced, rather than exceeded, Mrs. Braun's action lies not in defamation or libel, but must be brought against Aquarena Springs for breach of the consent given by Mrs. Braun to it.

No Texas case is cited on this point, nor have we found authority for this proposition. The gist of the argument, as we (we think) understand it, is that Mrs. Braun gave her release to Aquarena, qualified by the proviso that any pictures (and, implicitly, the use of any pictures) not be embarrassing to her or her family. Aquarena, by allowing itself to be misled by *Chic,* violated the terms of that release and is therefore liable to Mrs. Braun. Any cause of action against *Chic* should have been brought by Aquarena.

We decline to accept this tortuous, casuistic argument. The question here is not one of agency or privity or of other relationships among the parties. The ques-

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14. The court instructed the jury that if it believed that Mr. Nuwer informed Ms. Benton that *Chic* was a men's magazine, then it had to find that Aquarena had a duty to obtain Mrs. Braun's specific consent to publication of the picture. Apparently the jury did not believe Mr. Nuwer.

15. *Falwell v. Penthouse International, Ltd.,* 521 F.Supp. 1204 (W.D.Va.1981).

16. *Castagna v. Western Graphics Corp.,* 38 Or.App. 403, 590 P.2d 291 (1979).

17. *McAdam v. The Ridge Press, Inc.,* 57 A.D.2d 763, 394 N.Y.S.2d 202 (N.Y.App.Div.1977).

tion is whether *Chic* had consent to publish. Aquarena, acting in good faith and on the basis of the information the jury determined had been given to it by *Chic*, gave fraudulently induced consent, which is the legal equivalent of no consent. *See DeVall v. Strunk*, 96 S.W.2d 245, 246 (Tex.Civ.App.1936). All of *Chic's* tap dancing aside, *Chic* published the picture with no consent; Mrs. Braun was placed in a false light, and *Chic* cannot now hide behind Aquarena's skirts.

VI.

Chic contests, in addition to its liability under Texas law, the reasonableness of the amount of the jury award against it and the propriety of awarding punitive damages under the circumstances of this case.

A.

[11] *Chic* argues that Mrs. Braun presented such meager evidence of actual damages she suffered as a result of *Chic's* invasion of her privacy that the monetary award of $15,000 should not stand. Based on the evidence contained in the record, however, we cannot find that the jury's verdict on the invasion of privacy claim was unjustifiable. Mrs. Braun testified to embarrassment and humiliation and presented evidence that her work had suffered as a result of the publication of her picture. Her employer noted that there was "a difference in her emotional stability." Mrs. Braun was, and is, a respectable woman with a respectable, if unusual, job. Through deception, *Chic* obtained her picture and placed it in a magazine of nationwide circulation devoted to the publication of lewd pictures of women and to sex-

ual exploitation. Her picture appeared in a section of the magazine containing vulgar cartoons and jokes. Her testimony makes it amply clear that Mrs. Braun in fact suffered a great deal of personal humiliation, extreme embarrassment, and shock as a result of the publication.

Gertz requires that "all awards must be supported by competent evidence concerning the injury."

> [A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. . . . There need be no evidence which assigns an actual dollar value to the injury.

418 U.S. at 350, 94 S.Ct. at 3012.

Texas courts have consistently held that "[t]he amount of damages in a defamation suit is left largely to the discretion of the jury. . . . Such damages are purely personal and cannot be measured by any fixed rule or standard." *First State Bank v. Ake,* 606 S.W.2d at 702. "The award of damages is within the province of the jury and should not be disturbed unless there is clear showing of excessiveness or impropriety on the part of the jury." *Reicheneder v. Skaggs Drug Center,* 421 F.2d 307, 313 (5th Cir.1970). Applying this same standard to the invasion claim as we believe Texas courts would do, no showing of excessiveness or impropriety has been made here, and we will not disturb the jury's verdict.

B.

[12] We next turn to the punitive damages awarded by the jury for invasion of privacy. Questions have been raised about the propriety of punitive damages in libel

actions in the wake of *Gertz*. These questions have their origin in the somewhat ambiguous statement found in *Gertz* that "[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349, 94 S.Ct. at 3011. These words would seem to indicate that at least as far as the Supreme Court was then concerned, the appropriateness of punitive damages was an open question. A reading of the entirety of the opinion, however, convinces us that *Gertz* allows punitive damages to be awarded in libel actions where the publisher acts recklessly or with malice. In addition to the above "double negative," the Court does go on to say that "[i]t is necessary to restrict defamation plaintiffs *who do not prove knowledge falsity or reckless disregard for the truth* to compensation for actual injury." *Id.* (emphasis added). Further, *Gertz* notes that

> [p]unitive damages are wholly irrelevent to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence . . . . [t]he private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

418 U.S. at 350, 94 S.Ct. at 3012.

Unless we assume that the Court was not aware of the clear implications of what it was saying, we must assume that it intended that punitive damages are proper in libel actions upon a showing of recklessness or malice.

In *Golden Bear,* we stated that "*Gertz* . . . held that the states must require a showing of 'actual malice,' defined as ill will or reckless disregard of the falsity of the statement made, before a court may award punitive damages to private defamation plaintiffs. . . ." 708 F.2d at 947.

Texas has interpreted *Gertz* accordingly. In *A. H. Belo Corp. v. Rayzor,* 644 S.W.2d 71,85 (Tex.App.1982), the court stated that

> if Rayzor, for purposes of this case, were a private person and not, as we have held, a public figure, . . . he would be limited to compensation for actual injury. Neither would a private individual seeking libel damages be entitled to exemplary damages, unless he proved malice. *See Gertz v. Welch.* . . .

[13, 14] Whether a publisher acted with malice is a jury question. *Fitzjarrald v. Panhandle Publishing Co.,* 149 Tex. 87, 228 S.W.2d 499, 505 (1950). The jury here found that *Chic* had acted in reckless disregard for Mrs. Braun's reputation in publishing her picture and returned $50,000 in punitive damages on the invasion of privacy count. Texas courts have held that, for the purpose of awarding punitive damages, malice may be inferred from the conduct of the wrongdoer as well as proved by direct evidence. *Chandler State Bank v. Dorsey,* 618 S.W.2d 113 (Tex.Civ.App.1981); *Gardner v. Kerly,* 613 S.W.2d 795 (Tex.Civ.App. 14th Dist.1981). *See also National Bank of Commerce v. Shaklee,* 503 F.Supp. at 548-49. The testimony of members of the editorial staff of *Chic,* especially Mr. Nuwer, offers direct evidence that they acted with entire disregard for the falsity of their portrayal of Mrs. Braun. Mr. Nuwer testified that he knew that Aquarena Springs was "a family tourist attraction" and that there

was "nothing obscene or lewd or indecent about the place." Yet when asked to describe the predominant theme of *Chic* magazine, he replied, "Sexuality," and he agreed that some people could find the photographs of women contained in the magazine to be indecent. The jury was entitled to infer from these comments that Mr. Nuwer was actually aware that placing Mrs. Braun's picture in the context of *Chic* magazine would create a false impression of her.

In addition to this evidence, the jury's conclusion that *Chic* acted with malice toward Mrs. Braun is strongly supported by the evidence that *Chic* employees misrepresented the nature of the magazine to Aquarena Springs personnel in order to obtain transparencies of the picture for publication. The fact that the misrepresentations occurred on at least two separate occasions and were made by two different *Chic* employees entitled the jury to conclude that the misrepresentations were not inadvertent or immaterial, as *Chic* argued. The jury was fully justified in concluding that the editorial staff was aware that Aquarena Springs would not have cooperated in or consented to the appearance of the picture in *Chic* if it had known the true nature of that publication. There was ample evidence that the editorial staff consciously deceived Aquarena Springs personnel for the purpose of obtaining the picture.

[15] We recognize that because of *Gertz* and the nature of the false light invasion of privacy action, some distinctions can be drawn between an award of punitive damages in this case and the award of such damages in cases that do not implicate the first amendment. However, having decided that an award of punitive damages is appropriate in this case, we believe that the five factors set forth

in *Maxey v. Freightliner Corp.*, 665 F.2d 1367 (5th Cir. 1982) (en banc), are appropriate criteria by which to judge the amount of the award.[18] With respect to the quantum of punitive damages, we note that awards of three times actual damages generally have not been considered excessive in this circuit. *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir.1981). The award in this case is only slightly more than three times the amount of punitive damages.[19] Moreover, the conduct of *Chic* in obtaining the cooperation of the personnel of Aquarena Springs is precisely the type of conduct for which awards of punitive damages are most appropriate; that is, there is a strong public interest in discouraging the repetition of such conduct. After reviewing the evidence in this case in the light of the five factors set out in *Maxey*, we are convinced that the award of punitive damages is reasonable.

VII.

We note that *Chic* has raised a number of other claims of error committed below. While we do not address each in turn, we do note that many overlap with the issues which

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18. The five factors are: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability involved, (4) the situation and sensibilities of the parties, and (5) the extent to which defendant's conduct offends a public sense of justice and propriety. 665 F.2d at 1377.

19. In *Golden Bear*, punitive damages of $20,000 were upheld where actual damages were $30,000. 708 F.2d at 947. However, in that case the conduct of the defendant publisher did not approach the level of recklessness and active deception as has been attributed to *Chic* here.

have been addressed specifically. We find no merit in any of the remaining contentions.[20]

In summary, we hold that there can be no duplicative awards of damages arising from a single publication merely because that publication yields causes of action under state law for both defamation and invasion of privacy. Because of the court's instructions and the nature of the evidence presented in this particular case, we cannot say that the damage awards are not duplicative. In particular, we are not convinced that the jury's award for loss of reputation is supported by any facts independent of those which establish damages for invasion of privacy, that is, embarrassment and humiliation as a result of the publication; furthermore, we are convinced that the punitive damages award for loss of reputation cannot stand, as it lacks any basis of support independent of the punitive award for invasion of privacy. In order to ensure a proper verdict we are compelled to vacate and remand for retrial with respect to the entire damages issue. However, as we have indicated, we believe that such a retrial would be fruitless. If Mrs. Braun waives her right to retrial on this narrow issue, the district court is instructed to enter judgment for Mrs. Braun on the jury verdict as it relates to actual and punitive damages for invasion of privacy.

VACATED and REMANDED.

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20. "Nothing . . . in the First or Fourteenth Amendments requires that in a libel action an appellate court treat in detail by written opinion all contentions of the parties. . . ." *Time, Inc. v. Firestone*, 424 U.S. 448, 463, 96 S.Ct. 958, 969, 47 L.Ed.2d 154 (1976).

APPENDIX TO OPINION
RECORD ON APPEAL—VOLUME I

No. 82-1235—Braun v. Flynt

PAGE 000020-000023

1. Do you find that *Chic* defamed Mrs. Braun?

   Answer yes or no: *yes*

2. Do you find that the picture published by *Chic* left a false impression as to Mrs. Braun's reputation, integrity or virtue?

   Answer yes or no: *yes*

   If you answered No. 1 and No. 2 "yes," answer No. 3.

3. Do you find that *Chic* knew or should have known that the impression left was false?

   Answer yes or no: *yes*

4. What sum of money, if paid now in cash, will fairly and reasonably compensate Mrs. Braun for the damage to her reputation?

   Answer in dollars and cents or none: *$5,000.00*

   If you answered No. 3 "yes", answer no. 5.

5. Do you find that *Chic* acted in willful or reckless disregard of Mrs. Braun's reputation by publishing her picture?

   Answer yes or no: *yes*

6. What sum of money, if paid now in cash, should be awarded against *Chic* as exemplary or punitive damages for injuring Mrs. Braun's reputation?

   Answer in dollars and cents or none: *$25,000.00*

7. Do you find that *Chic's* publication of Mrs. Braun's picture created a false impression of her or was an unauthorized appropriation of her picture, reputation or accomplishments?

   Answer yes or no: *yes*

8. Do you find that *Chic* published Mrs. Braun's picture in a manner highly offensive to a reasonable person?

   Answer yes or no: *yes*

9. Do you find that *Chic* received a valid consent from Aquarena Springs to publish Mrs. Braun's picture? In answering this question, consider whether Mr. Nuwer misrepresented the nature of the magazine.

   Answer yes or no: *no*

10. What sum of money, if paid now in cash, will fairly and reasonably compensate Mrs. Braun for the invasion of her privacy?

    Answer in dollars and cents or none: *$15,000.00*

11. Do you find that *Chic* acted in willful or reckless disregard of Mrs. Braun's right to be free from unwarranted publicity?

    Answer yes or no: *yes*

12. What sum of money, if paid now in cash, should be awarded against *Chic* as exemplary or punitive damages for invading Mrs. Braun's privacy?

    Answer in dollars and cents or none: *$50,000.00*

POLITZ, Circuit Judge, specially concurring:

I concur in the result insofar as it relates to the invasion of privacy claim, but would reach and specifically

address defamation and reverse as to that issue. The truth of the matter published is a defense to a defamation action. *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. 2d 154 (1976); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 498-499, 95 S.Ct. 1029, 1047-1048, 43 L.Ed.2d 328 (1975) (Powell, J., concurring). It is conceded that the report regarding Ralph the diving pig and Mrs. Braun was actually accurate and that neither the picture nor the caption was distorted or offensive. That factual accuracy and nondistortion foreclosts consideration of the issue of damages based on alleged defamation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1235

D. C. Docket No. A-77-CA-242

ED BRAUN, ET AL.,

Plaintiffs-Appellees,

vs.

LARRY C. FLYNT,

Defendant,

CHIC MAGAZINE, INC.

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before POLITZ and JOLLY, Circuit Judges, and HUNTER*, District Judge.

J U D G M E N T

(Filed May 29, 1984)

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated and that this cause be and the same is

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*District Judge of the Western District of Louisiana, sitting by designation.

hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

MARCH 9, 1984

POLITZ, Circuit Judge, specially concurring.

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals Fifth Circuit

/s/ L. St. Pierre
Deputy

ISSUED AS MANDATE: MAY 24, 1984 New Orleans, Louisiana

APPENDIX D

ED BRAUN, et al.,

Plaintiffs-Appellees,

vs.

LARRY C. FLYNT,

Defendant,

CHIC MAGAZINE, INC.

Defendant-Appellant.

No. 82-1235.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

May 14, 1984

In suit against magazine for defamation and invasion of privacy, the United States District Court for the Western District of Texas, at Austin, Lucius Desha Bunton, III, J., entered judgment on verdict in favor of plaintiff, and magazine appealed. The Court of Appeals, 726 F.2d 245, vacated and remanded. On petition for rehearing, the Court of Appeals held that affirmance of award for invasion of privacy was not precluded on ground that it was based on instructions authorizing recovery on either a "false light" or an "appropriation" theory and that there was no evidence to support recovery for appropriation, where court was satisfied that the verdict was not based solely on the theory of appropriation of plaintiff's likeness.

Suggestion for rehearing en banc denied; petition for rehearing denied.

1. Federal Civil Procedure 2336

When two claims have been submitted to the jury, whether on a general verdict or in a single interrogatory, new trial may be required if one of the claims was submitted erroneously.

2. Federal Courts 907

General verdict can be upheld, even when a claim erroneously has been submitted, where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it.

3. Federal Civil Procedure 2174

Jury award for invasion of privacy was not defective because it was based on instructions authorizing recovery on either a "false light" or an "appropriation" theory, though there was no evidence to support recovery for appropriation, where court was satisfied with that verdict was not based solely on the theory of appropriation of plaintiff's likeness, in light of the focus of plaintiff's case on a false impression theory, trial court's instructions, and jury's answers to separate interrogatories on related matters.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 9, 1984, 5th Cir. 1984, 726 F.2d 245)

Before POLITZ and JOLLY, Circuit Judges, and HUNTER*, District Judge.

PER CURIAM:

No member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

The petition for panel rehearing also is DENIED. Most of the arguments raised by the appellant Chic Magazine, Inc. in the petition for rehearing were fully considered by the panel in rendering our opinion. We write to address a single issue: Chic's contention that the jury award for invasion of privacy may not be affirmed because it was based on instructions authorizing recovery on either a "false light" or an "appropriation" theory and because there was no evidence to support a recovery for appropriation.[1]

[1, 2] When two claims have been submitted to the jury, whether on a general verdict or, as here, in a single interrogatory, a new trial may be required if one of the claims was submitted erroneously. *United New York and*

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*District Judge of the Western District of Louisiana, sitting by designation.

1. The jury verdict of actual damages for invasion of privacy was based on a special interrogatory which asked: "Do you find that *Chic's* publication of Mrs. Braun's picture created a false impression of her or was an unauthorized appropriation of her picture, reputation or accomplishments?" The special interrogatory for punitive damages for invasion of privacy was worded similarly.

New Jersey Sandy Hook Pilot Ass'n v. Halecki, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541 (1959). In *Halecki*, the Supreme Court said, "A new trial will be required for there is no way to know that the invalid claim . . . was not the sole basis for the verdict." On the other hand, a general verdict can be upheld, even when a claim erroneously has been submitted "where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it." *E.I. Du Pont de Nemours v. Berkley & Co., Inc.*, 620 F.2d 1247, 1258 n. 8 (8th Cir. 1980). *See, e.g., Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970); *Gardner v. General Motors Corp.*, 507 F.2d 525, 529 (10th Cir. 1974).

[3] Despite Chic's objections, we are totally satisfied, or, expressed in the words of the Eighth Circuit, "reasonably certain," that the verdict for Mrs. Braun in this case was not based solely upon the theory of appropriation of her likeness.[2] There was little if any evidence presented at trial tending to show that Mrs. Braun had been damaged by appropriation. The entire focus of Mrs. Braun's case was her contention that the publication of her picture in *Chic* created a false impression of her and damaged her reputation. The district court instructed the jury that in awarding compensatory damages for invasion of privacy it could consider Mrs. Braun's "personal humiliation, mental anguish and suffering." In addition, in answer to a separate interrogatory also relating to Mrs. Braun's invasion of privacy claim, the jury found that

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2. In response to *Chic's* petition for rehearing, Mrs. Braun has not argued that the evidence presented at trial would support a verdict based on the theory of appropriation.

"*Chic* published Mrs. Braun's picture in a manner highly offensive to a reasonable person." This finding is necessary to a false-light invasion of privacy claim, but does not form part of the claim for appropriation of likeness. *See Restatement (Second) Torts* §§ 652C, 652E (1977).

Finally, the jury's answers to special interrogatories relating to defamation, a cause of action closely related to false-light invasion of privacy, indicate to us that the basis of the award for invasion of privacy was the false impression of Mrs. Braun that the jury believed to have been created by *Chic's* publication of her picture. "To permit . . . issues which occupied positions of . . . relative insignificance in the trial to be treated now as so important as to make their submission to the jury prejudicial would not serve the interest of justice." *Collum v. Butler,* 421 F.2d at 1260. We find unreasonable Chic's assertion that the outcome of the trial would have been affected if the appropriation issue had not been submitted to the jury.

SUGGESTION FOR REHEARING EN BANC DENIED; PETITION FOR REHEARING DENIED.

A true copy

Test: GILBERT F. GANUCHEAU

Clerk, U.S. Court of Appeals Fifth Circuit

/s/ L. St. Pierre
Deputy

New Orleans, Louisiana May 24, 1984

Office-Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-250

In The

Supreme Court of the United States

October Term, 1984

CHIC MAGAZINE, INC.,

Petitioner-Defendant,

vs.

ED BRAUN AND JEANIE BRAUN,

Respondents-Plaintiffs.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's entire presentation is flawed by the fatal assumption that by disregarding the overwhelming evidence of CHIC's willful and reckless conduct, this case can be repostured into a challenge of petitioner's rights guaranteed by the First and Fourteenth Amendments. No such challenge is presented by this case. The First Amendment has never been successfully used as a shield to protect a publisher who deliberately conceals the true nature of a publication in order to obtain photographs which are published, not to convey any newsworthy message, but rather to sexually arouse and appeal to the purient interest of its readership. Properly analyzed, the questions presented for review are as follows:

1. Whether Jeanie Braun is a public figure for purposes of applying the actual malice standard of *New York Times v. Sullivan.*

2. Whether a publication depicting newsworthy material has a constitutional privilege when the material is published in a manner that is highly offensive to a reasonable person.

3. Whether publication of Jeanie Braun's photograph in CHIC was an invasion of privacy.

4. Whether the jury was properly allowed to consider the context of CHIC in determining whether publication was an invasion of privacy.

5. Whether the evidence established both actual and exemplary damages which were properly submitted in the court's charge.

6. Whether the jury's answer to Interrogatory number 7 will support the trial court's judgment.

7. Whether there was valid consent to publish the photograph.

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STATEMENT OF FACTS

Petitioner has presented a distorted interpretation of the record which in some instances is factually inaccurate. To correct these distortions and to focus on the issues actually presented, a complete statement of facts is essential.

CHIC magazine, (PX. 5), is a Larry C. Flynt publication which has as its dominant theme "female nudity," (R. 82), and "nude women," (R. 69), revealing the "female genitalia" in "a manner in which it will sexually arouse men." (R. 70). In fact, the photograph department has been directed to have models physically "manipulate" their genitals, (R. 74), with the result that the women are portrayed as either being "ready" or having "just completed a sex act." (R. 83). The editor of CHIC, Jean-Louis Ginibre, agreed that the magazine depicts "unchastity in women." (R. 73, 124). The magazine features caricatures which are "indecent" according to CHIC's associate art director, Kathleen Philpott, (R. 87), and in some photos the magazine shows a "sexual act going on" between a man and woman. (R. 88).

Included in this magazine is a section called "Chic-Thrills." Henry Nuwer had overall responsibility for the "Chic-Thrills" section of the December, 1977 issue of CHIC. (R. 110). The associate art director for the "Chic-Thrills" section was Kathleen Philpott, (R. 79), who stated that the dominant theme that runs throughout the magazine is "female nudity," (R. 82), featuring female genitals in poses called a "beaver shot." (R. 83). Ms. Philpott was very quick to point out that *all* of the girls that appear in the magazine sign a release, (R. 84), have a complete understanding of the "type and nature"

of the magazine, (R. 85), and are "fully advised" about the type of publication. (R.85).

More importantly, Ms. Philpott made it clear that she always gets the permission of anybody whose picture appears in the "Chic-Thrills" section:

> "Q. Do you seek out the permission of anybody who is actually shown in the photograph before you publish that photograph in this section—Do you try to?
>
> A. Yes.
>
> Q. And you have a form that you're familiar with that you used to make sure that *you have their permission before you publish their photographs when you're responsible for it in the 'Chic-Thrills' section;* is that correct?
>
> A. Yes—well.
>
> Q. Do you have those here in your office, the forms that you use?
>
> A. I believe the Photo Department has them.
>
> Q. Do you have any in your office?
>
> A. No. I get them from the Photo Department as I need them." (emphasis added.)

Ms. Philpott also stated that if she was requesting a photograph of a person to be used in CHIC she would be certain to "point out all of the characteristics of the magazine," which is "predominantly female nudity." (R. 106).

Henry Nuwer is the CHIC employee responsible for putting Jeanie Braun's picture in the December, 1977 issue of CHIC. (R. 110). Nuwer bills himself as "a writer who floats," (R. 108), who was "a crazy headline man."

(R. 109). While at CHIC, he wrote the filthy titles for the articles, which he described as "funny puns," (R. 110), and had full responsibility for the "Chic-Thrills" section. (R. 110). In addition, he wrote the article on page 96 of this issue entitled, "Balcones Fault. Asses On The Line," accompanied by a picture of nude males he described as, "The sharpest shooters out of Texas since Lee Harvey Oswald." (PX. 5 at 96; R. 134).

In July, 1977 Nuwer called Jennifer Ross Benton in the public relations office in Aquarena Springs in San Marcos, Texas, (R. 33), and grossly misrepresented the nature of his magazine. When she questioned him about his magazine, Ms. Benton was led to believe it was "Shic" magazine, (R. 34), a "fashion magazine with travel articles in it." (R. 33). When questioned further, he stated it had the same readership as "Redbook or McCalls." (R. 33). Not *once* did he mention that the true purpose of the magazine was to depict female nudity, (R. 33), that it advertised various sex gadgets for sale, (R. 33, 133), that the articles are all sexually oriented, (R. 131), that the pictures "depict unchastity," (R. 124), that it is designed to "sexually arouse men," (R. 70, 124), or that pot smoking paraphernalia was advertised on the back cover. (PX. 5). Nuwer's cavalier explanation for this glaring omission was simple, "The idea of nudity did not come up in the least. She didn't ask it and I didn't present it." (R. 2, 33).[1]

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[1]CHIC tried to convince the jury that Nuwer told Mrs. Benton it was a "men's magazine" which featured "fashion" and "travel" articles. (R. 113). This specious effort failed when it was established that there were *no* fashion or travel articles in CHIC. (R. 123, 128).

As a result of this conversation, several photographs were sent to Nuwer. One photograph was of Jeanie Braun in the Aquarena pool holding a feeding bottle. It also shows a pig she had trained diving toward the oversized nipple on the feeding bottle. It was this photograph which was published in the December, 1977 issue in the "Chic-Thrills" section.

Sometime after July, 1977, both Nuwer and Ms. Philpott called Ms. Benton concerning a delay in receiving the requested photographs. It is undisputed that neither ever told Ms. Benton the predominant theme of CHIC. (R. 104). "The idea of nudity never came up." (R. 234).

In order to shorten this brief, references to other portions of the record will be made as applicable in the argument.

SUMMARY OF ARGUMENT

The jury found on ample evidence that CHIC's conduct in publishing Mrs. Braun's picture in the "Chic-Thrills" section of the December, 1977 issue constituted an invasion of privacy and was done with such willful and reckless disregard for her rights as to justify punitive damages. In this instance, CHIC failed to follow its customary rule that a photograph release be obtained from anybody whose photograph appeared in CHIC. Having failed by its own neglect, CHIC now seeks to have the First Amendment used as a shield to cover its negligence.

CHIC's strained effort to erect a First Amendment constitutional challenge in this case is misplaced. Jeanie Braun's picture was neither sought nor published as a

newsworthy event. It was sought by CHIC's "pun" writer to be used in his "Chic-Thrills" section, a section of the magazine dedicated to sexually ridiculing women; a use the jury found was "highly offensive to a reasonable person." (R. 22, Vol. 1).

ARGUMENT

I. Jeanie Braun is not a public figure for purposes of applying the actual malice standard of New York Times v. Sullivan.

Completely disregarding its conduct in obtaining Jeanie Braun's photograph, its failure to acquire its customary release, and the jury findings in this case, CHIC argues that Jeanie Braun is a public figure and therefore, must satisfy the actual malice requirement of *New York Times v. Sullivan*, 376 U.S. 254 (1964). The landmark case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) provides invaluable guidance into the determination of public figure status:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

Id. at 351.

A careful reading of *Gertz* reveals two important characteristics determinative of public figure status,

neither of which is present in this case. First, public figures usually enjoy significantly greater access to public channels of communication and thus, have a more realistic opportunity to rebut defamatory charges. Second, public figures can be said to have voluntarily exposed themselves in a meaningful sense to an enhanced risk of injury or invasion of privacy.

Under the *Gertz* standard, it is clear that Jeanie Braun is neither an "all purpose" nor a "limited" public figure. She clearly does not have the fame and notoriety requisite to general public figure status. Equally clear, since this action involves no public controversy, Jeanie Braun did not inject herself into any public controversy or assume any "special prominence in the resolution of public questions" in order to become a limited public figure. Therefore, the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964) does not apply in this case.

It is instructive to consider a later U. S. Supreme Court opinion which applied the *Gertz* standard in the context of a libel action against TIME Magazine. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court held that the plaintiff, a socialite and the former wife of the heir to the fortune of one of American's wealthier industrial families, was not a public figure within the *Gertz* definition. It was crucial to the Court that:

> "Respondent did not assume any role of a special prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."

Id. at 453. If an individual of the social prominence of the plaintiff in *Firestone* is deemed a private individual

for purposes of libel law, it is difficult to see how Jeanie Braun could be considered anything other than a private individual.

II. A defamatory publication depicting "newsworthy" material has no constitutional privilege when the material is published in a manner that is highly offensive to a reasonable person.

CHIC's contention that Jeanie Braun's photograph was published to depict a "newsworthy" event or an event of "public interest" is without merit. First, it was never intended by CHIC to be published as a "newsworthy" event. It was published in the "Chic-Thrills" section in which every single photo, article, blurb, or comment is an attempt to sexually ridicule women. It was only called upon to be "newsworthy" when CHIC started scurrying around to escape liability for failing to follow its customary practice of obtaining a photograph release before publishing photographs in this section.

Second, the notion that defamatory publication of matters of public or general interest regarding private individuals is protected by the actual malice standard of *New York Times v. Sullivan* has been explicitedly rejected by the Supreme Court on several occasions.[2] Most recently, in *Wolston v. Reader's Digest Ass'n,* 443 U.S. 157, 168 (1979) the Court held that newsworthiness alone does not insulate a defamatory publication for liability. The Court reasoned:

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[2]CHIC's argument that the *New York Times v. Sullivan* requirement of actual malice is a necessary element of Mrs. Braun's case is mooted somewhat by the jury's answer to Interrogatory number eleven (11) that CHIC acted in willful or reckless disregard in publishing Mrs. Braun's photograph.

> "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify the application of the demanding burden of *New York Times*."

Id. at 167-68; *see Rinsley v. Brandt*, 446 F. Supp. 850, 855-56 (D. Kan. 1977) (concludes newsworthiness or public interest doctrine has been abandoned in invasion of privacy actions).

Publication of newsworthy material is protected only to the extent that it is "publicized in a manner that is not highly offensive to a reasonable person." *See Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980). If reasonable minds might differ whether the published material could be highly offensive to a reasonable person, a fact issue exists for jury determination. *Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944, 948 (5th Cir. 1983). The jury found that "Chic published Ms. Braun's picture in a manner highly offensive to a reasonable person," (R. 22, Vol. 1), a finding compelled by the publication of Jeanie Braun's photograph in the midst of grossly pornographic photographs and material whose only stated purpose is to "sexually arouse men." (R. 70).[3]

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[3]CHIC's contention that it was saddled with the burden of proof ignores the practicalities of the charge submitted to

(Continued on following page)

As noted by the court in *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) the protection for newsworthy material is directed toward "issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period." Surely, information regarding a children's show with a trained diving pig and its trainer is not needed to help individuals cope with the exigencies of their period.

III. Publication of Jeanie Braun's photograph in CHIC was an invasion of privacy.

The jury found that CHIC's publication was an invasion of privacy. A cause of action for invasion of privacy has been established in Texas since *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973). The cause of action protects the right of an individual to "be left alone, to live a life of seclusion and to be free from unwarranted publicity." *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973); *accord, Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 490 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App.—San Antonio 1976, no writ). This right may be violated by publicity which places the plaintiff in a false light in the public eye or by an appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage. For example, a plaintiff's right to privacy is violated by the unauthorized appropriation of his name and likeness for advertising. *See Kimbrough v.*

(Continued from previous page)

the jury. To establish liability, plaintiff was required to obtain an affirmative answer to Interrogatories numbers 7 and 8. The burden was clearly on plaintiff to prove this element of her case.

Coca-Cola/USA, 521 S.W.2d 719, 722 (Tex. Civ. App. Eastland 1975, writ ref'd n.r.e.).

Both of these elements of invasion of privacy are established in this case. First, the picture published amid the pornography exhibited by CHIC magazine places Mrs. Braun in a false light in the public eye. Second, CHIC has appropriated Jeanie Braun's likeness for CHIC's benefit or advantage. An analogous case was used as an illustration in the RESTATEMENT OF TORTS (SECOND) § 652E, comment c, illustration 8 (1977). In that case, *Leverton v. Curtis Publishing Co.*, 192 F.2d 974 (3rd Cir. 1951), the plaintiff had been run over by a car. A nearby photographer took a picture of her, and the dramatic photograph was published in a newspaper the following day with the news story. Twenty (20) months later, the defendant used the photograph to illustrate his story entitled, "They Ask to be Killed," which emphasized pedestrian carelessness and negligence. A judgment for plaintiff was upheld on the basis of an invasion of privacy. *Id.* at 977-78.

It is strikingly similar that the use of a photograph in the *Leverton* was not intrinsically offensive in a context which made it a news item. When it was republished twenty (20) months later, however, it became offensive just as Mrs. Braun's photograph placed her in a false light when it was inserted amid photographs of professional models who physically have had their genitalia manipulated to simulate the after-effects of intercourse.

Martin v. Johnson Publishing Co., 157 N.Y.S.2d 409 (Sup.Ct. 1956) is another case in which photographs published in an unfavorable context were found to constitute invasion of privacy. In *Martin* the court found both a

libel and an invasion of privacy when pictures for which the plaintiff had posed for use in EBONY were used instead in another magazine to illustrate a story entitled "Man Hungry." *Id.* at 411. In another case, *Gill v. Curtis Publishing Co.*, 239 P.2d 630 (Cal. 1952) (in bank) the California Supreme Court held that a cause of action for invasion of privacy had been stated when a photograph of plaintiff, in a public place in an affectionate pose, was used in conjunction with another article discussing the perils of "Love at First Sight" based purely on sexual attraction. *Id.* at 635.

False light privacy actions are conceptionally quite similar to defamation actions. In fact, the two actions have often been treated in the same way by the courts. For this reason, the *Gertz* decision and its progeny suggest that the focus in a false light privacy action should be on the status of the plaintiff as a public figure or private individual rather than on the newsworthiness of the publication. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1288 (D.D.C. 1981); *Rinsley v. Brandt*, 446 F. Supp. 850, 855-56 (D. Kan. 1977).

In *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285 (D.D.C. 1981) the court held that the same negligence standard used in defamation actions by private individuals should be applied to false light privacy actions involving private individuals. The court in *Dresbach* noted that in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) an actual malice standard was applied in a false light case, but observed that *Gertz v. Robert Welch, Inc.*, had subsequently held that actual malice need not be proven by a private individual in a defamation action even though the subject

matter of the publication is newsworthy. *Id.* at 1288. The court, noting that *Gertz* was decided after *Time, Inc. v. Hill,* stated:

> "Although the Supreme Court has had no occasion to decide the matter, no reason appears to distinguish false light invasion of privacy actions from defamation actions in this regard."

Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1288 (D. D.C. 1981); *accord, Rinsley v. Brandt,* 446 F. Supp. 850, 855-56 (D. Kan. 1977).

Texas has adopted a negligence standard for defamation actions involving private individuals. *Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809, 819 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977). There are no policy reasons which mitigate against the adoption of a similar standard for false light invasion of privacy actions involving private individuals.

IV. The jury was properly allowed to consider the context of CHIC in determining the issues presented.

The false light invasion of privacy tort consists of publicly placing a person in a false light in a manner highly offensive to a reasonable person or a person of ordinary sensibilities. RESTATEMENT OF TORTS (SECOND) § 652E (1977); *see Devlin v. Greiner,* 371 A.2d 380, 389 (N.J. Super. Ct. Law Div. 1977). It is the context in which the picture is published which creates the false light. Commonsense requires that the publication be "considered in its entirety, both the picture and the story which it illustrates." *Martin v. Johnson Publishing Co.,* 157 N.Y.S.2d 409, 411 (Sup. Ct. 1956).

In another case, *Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983), plaintiffs complained that published statements, when considered in the context of the entire article, created false impressions. The defendant countered that the context or surrounding circumstances were irrelevant and that only the portion of the article dealing with plaintiff could be considered by the court. The Fifth Circuit rejected defendant's argument, saying:

> "Although the individual statements printed in the article, if read out of context, were true, the jury found that their overall effect was defamatory."

Id. at 949. The court held that for proper analysis, the publication:

> "must be construed as a whole. If a defamatory meaning *may* exist, then the statement or article is considered ambiguous, and the court must allow the jury to determine whether an ordinary reader would perceive the statement as defamatory." (original emphasis).

Id. at 948.

The Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) left it to the states to define the appropriate standard of care for a publisher of matters injurious to a private individual, and Texas has adopted a negligence standard of care for these cases. *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). Under the appropriate standard, even "newsworthy" information may not be published in a manner that is highly offensive to a reasonable person.

If CHIC had a legitimate section of its magazine devoted to matters of public interest, so that newsworthy

information was presented in a manner that is not highly offensive to a "reasonable person," then the context of CHIC might be unimportant. Such is not the case, however. The record is undisputed that everything in CHIC is sexually oriented, and the jury was entitled to see this content to determine if Mrs. Braun's photograph was published in a manner "highly offensive to a reasonable person." (R. 22, Vol. 1).

Under Texas law, the facts and circumstances surrounding the publication of libelous material are relevant in determining whether the publication is liable. In *Houston v. Interstate Circuit, Inc.*, 132 S.W.2d 903 (Tex. Civ. App. Galveston 1939, no writ) the court held that a motion picture defaming the Texas statesman, Sam Houston, must be viewed in its entirety. The court emphasized that separate scenes could not be isolated from their context:

> "Since the picture as an entirety—as well as in the seven particularized portrayals set out *supra*—is declared to constitute such a libel, it is plain, under the well-settled law of libel, that it must be considered as a whole, from the beginning to the end, in order to determine whether it is libelous and consequently actionable; in other words, separate scenes and sentences may not be isolated from the balance and independently examined—apart from the whole . . . ."

Id. at 906. By the same token, CHIC may not isolate the photograph of Mrs. Braun from its offensive context.

In *Fitzjarrald v. Panhandle Publishing Co.*, 228 S. W.2d 499, 504 (Tex. 1950) the court considered an alleged libel in a newspaper article and stated: "In passing upon the language complained of as libel it must be

considered in the light of all of the facts and circumstances under which it was used." In another case, *Times Publishing Co. v. Ray,* 1 S.W.2d 471, 473 (Tex. Civ. App.—Eastland), *aff'd,* 12 S.W.2d 165 (Tex. 1929), the court reiterated that the publication as a whole must be considered and noted: "A party will not be permitted to carve out isolated words or phrases and have them considered without reference to their settings." In a third case, *Hedgpeth v. Gartman,* 136 S.W.2d 641, 642 (Tex. Civ. App.—Waco 1939), *rev'd on other grounds,* 157 S. W.2d 139 (Tex. 1941), the court succinctly stated the applicable Texas law:

> "The general rule of law in this state is that in determining whether a writing or publication is defamatory in chacater, the language used therein must be considered as a whole and in the light of all pertinent facts and circumstances alleged in connection therewith."

Other jurisdictions have applied the same standard as Texas. *See, e.g., Regan v. Sullivan,* 557 F.2d 300, 308-09 (2d Cir. 1977) (plaintiff's picture placed in "Rogue's Gallery"); *Peay v. Curtis Publishing Co.,* 78 F. Supp. 305, 307 (D.D.C. 1948) (picture of plaintiff taxicab driver with article depicting taxi drivers as ill-mannered and dishonest); *Metzger v. Dell Publishing Co.,* 136 N.Y.S.2d 888, 891 (Sup. Ct. 1955) (picture of plaintiff on street corner with other young men to illustrate article on gangs). In another case, *Russell v. Marboro Books,* 183 N.Y.S.2d 8, 17 (1959), a high fashioned model's picture was placed together with an elderly male who was holding a "dirty book." The court found that the clear implication of the picture, that plaintiff was a "willing call girl," was both false and defamatory.

V. The evidence established both actual and exemplary damages which were properly submitted in the court's charge.

The court properly charged the jury that they could award compensatory damages for personal humiliation, mental anguish and suffering if they found that CHIC invaded Mrs. Braun's privacy. (R. 37, Vol. 1). All of these elements of damage are established in the record.

Ed and Jeanie Braun, married for sixteen (16) years, lived in the small community of Lockhart, Texas where Ed Braun has been a deputy sheriff for thirteen (13) years. (R. 175, 176). In this capacity, Ed Braun patrols the entire county, is highly visible, and is well known. (R. 176). Their primary leisure activity involves raising registered quarter horses and participating in the Texas Barrel Racing Association and the Texas Peace Officer's Rodeo Association. (R. 177).

On Wednesday, November 23, 1977, Mrs. Braun was enroute home to Lockhart from her employment at Aquarena Springs in San Marcos, Texas. (R. 197). Realizing she could run out of gasoline before reaching Lockhart, she stopped at a drive-in grocery store in Maxwell, Texas to purchase gasoline. (R. 180). When she walked in the store a total stranger walked up to her and said, "Hey, I know you" and explained that she was in CHIC Magazine. (R. 197). When Mrs. Braun denied being in any magazine,

> "he went and got the magazine. And I stood there because I was really, really terrified. I thought something was going to happen, my picture is not in this magazine. My legs were like jelly, I couldn't untrack. I was petrified. And he was thumbing through these

> pictures. I was raised in a private Catholic school and I had never seen anything like this. And I was terrified, I didn't know what he had in mind. I thought something horrible was going to happen to me. He flipped through that book and my picture was in that book. I didn't believe it. I stood there like a dummy."

(R. 197-98).

That evening, "She was very upset." (R. 179). She said she "felt like crawling in a hole and never coming out." (R. 200). As a result of this incident, she "did not want to return to work." (R. 199). Her employer at Aquarena Springs stated:

> "Mrs. Braun really took this very very serious. It embarrassed her around the employees."

(R. 158). He was "able to observe a difference in her emotional stability while at work," and observe "humiliation" or "embarrassment" on her part. (R. 159). She was replaced as the Children's Show Director for a year. (R. 200).

As a result of Mrs. Braun's picture being published, Aquarena Springs received correspondence from CHIC readers requesting information and more pictures of "the beautiful lady." (PX. 9 & 10). One such reader identified himself as a convict serving time in a penitentiary.

The evidence clearly satisfied the Texas requirement for invasion of privacy which allows recovery for humiliation and mental suffering even if there is no evidence of a loss of monetary damages. *See Billings v. Atkinson*, 489 S.W.2d 858, 861 (Tex. 1973). In short, the amount of damages in a case of this character, with the compelling evidence which was introduced, is left largely to the discretion of the jury. *Hornby v. Hunter*, 385 S.W.2d 473,

476 (Tex. Civ. App.—Corpus Christi 1964, no writ); *Freeman v. Schwenker*, 73 S.W.2d 609, 611 (Tex. Civ. App.—Austin 1934, writ ref'd).

By the same token, CHIC's conduct in maliciously deceiving Aquarena Springs on not one, but three different occasions, clearly supports the jury's findings that CHIC "acted in willful or reckless disregard" of the plaintiff's rights. (R. 21, Vol. 1). Under the *Gertz* test and Texas law, punitive damages may be recovered when the injured party establishes the existence of a willful or wanton act sufficient to support a finding of malice. *British Overseas Airways Corp. v. Tours & Travel, Inc.*, 568 S.W.2d 888, 894 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.). In *United Press Int'l., Inc. v. Mohs*, 381 S.W.2d 104, 109 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.), a libel action against the international news service, the court stated: "Gross negligence constituting ground for exemplary damages has been said to be that entire want of care which would raise a belief that the act complained of was *the result of conscious indifference to the rights of the person to be affected by it.*" (emphasis added).

VI. The jury's answer to Interrogatory number 7 will support the trial court's judgment.

Defendant's contention that the jury award for invasion of privacy may not be affirmed because it was based on instructions authorizing recovery on either a false light or a misappropriation theory is flawed by the erroneous assumption that separate recoveries were sought on a false light theory or a misappropriation theory. They were not. Recovery was sought for the tort of invasion of privacy—a single tort which is proven by conduct that established either false light or misappropriation.

Defendant's conduct in publishing plaintiff's photograph constituted an invasion of privacy if the conduct either: (1) placed her in a false light in the public eye; or (2) was an appropriation of her likeness for defendant's benefit. The single cause of action is for invasion of privacy. The conduct of defendant establishing an invasion of privacy is the act of either placing her in a false light or an appropriation of her likeness for defendant's benefit.

Although false light and appropriation were the only two acts submitted to the jury to determine if there had been an invasion of privacy, there are actually four areas of conduct which give rise to this tort in Texas. In *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 490 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.) the court observed that the tort of invasion of privacy is based upon

> "the right of an individual to be left alone, to live a life of seclusion, and to be free from unwarranted publicity. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). It is generally recognized that the right may be violated by any one of the following acts:
>
> 1. Intrusion upon the plaintiff's physical solitude or seclusion.
>
> 2. Public disclosure of private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage."

In the case at bar, Interrogatory number seven (7) submitted only two of these acts which constitute invasion of privacy because only false light or appropriation were

applicable to the facts of this case. The jury's affirmative finding to this interrogatory did not mean two separate theories of tort were established. The jury simply found that there had been an invasion of privacy because plaintiff had been placed in a false light or that there had been a misappropriation of plaintiff's likeness for defendant's benefit.[4]

A direct analogy is found in automobile negligence cases. Although negligence is the tort that is committed, any one of several acts or omissions may give rise to that negligence; i.e., failure to keep a proper lookout, speeding, failure to apply brakes, improper speed. An affirmative finding on any single issue establishes that defendant was negligent and that defendant is responsible for plaintiff's damages. An affirmative finding to all of these issues does not establish an independent theory of liability for which separate damages are awarded. Although any number of separate acts or omissions can give rise to defendant's negligence, only one theory of liability is submitted—negligence. Similarily, only one damage issue is submitted for the injuries caused by that negligence.

As is the case with a negligence cause of action, defendant's conduct in either placing plaintiff in a false light or misappropriating plaintiff's likeness can only give rise to the single tort of invasion of privacy for which the jury may make a single award of damages. Interrogatory number 7 asked whether defendant was guilty of either of two acts which establish this single tort, and the jury's finding of an invasion of privacy is supported by

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[4]Petitioner's argument is further flawed because the evidence does establish a claim for misappropriation of plaintiff's likeness.

ample evidence. In any event, no reversible error exists when "it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it." *E. I. DuPont De Nemours v. Berkley & Co.*, 620 F.2d 1247, 1258 n. 8 (8th Cir. 1980).

VII. There was no valid consent to publish the photograph.

The evidence established and the jury found that CHIC did not obtain valid consent to publish Mrs. Braun's photograph. (R. 22, Vol. 1). Instead, CHIC obtained the photograph and consent through fraud and misrepresentation. Now, CHIC attempts to avoid responsibility for its conduct by contending that Aquarena is solely responsible for harm to Mrs. Braun because Aquarena allowed itself to be deceived by CHIC's representations.

This argument will not withstand even cursory inspection. It was CHIC's conduct in wrongfully procuring and publishing Mrs. Braun's photograph that led to her injury. CHIC cannot insulate itself from liability by hiding behind concepts similar to that of privity, which has been rejected by Texas courts. *See Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977). The bottomline is that CHIC, without consent, published a photograph which placed Mrs. Braun in a false light that was highly offensive to a reasonable person. CHIC must accept responsibility for its own conduct, and that responsibility was appropriately placed upon CHIC by the jury.

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CONCLUSION

CHIC's argument asks the court to disregard the true nature of the "Chic-Thrills" section, disregard the jury finding that Mrs. Braun's photograph was published in a manner highly offensive to a reasonable person, and re-examine the evidence in the hope that upon re-examination a different result will emerge. CHIC cannot avoid responsibility for its willful and reckless conduct, and its publication of Mrs. Braun's photograph in a manner which is highly offensive to a reasonable person is not protected by the First Amendment. Therefore, CHIC's petition for writ of certiorari should be denied.

Respectfully submitted,

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